

39
No. 93-1456-CSX
Status: GRANTED

Title: U.S. Term Limits, Inc., et al., Petitioners
v.
Ray Thornton, et al.

Docketed:
March 17, 1994

Court: Supreme Court of Arkansas

Vide:
93-1828

Counsel for petitioner: Kester, John G., Bryant, J. Winston,
Warren, Edward W.

See also:
93-1828
93-1833

Counsel for respondent: Bartley, Sherry P., Davidson, Michael,
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Bryant, J. Winston, Bork, Robert H., Phillips, Carter
G., Lee, Rex E.

Entry	Date	Note	Proceedings and Orders
1	Mar 17 1994	G	Petition for writ of certiorari filed.
2	Apr 4 1994		Waiver of right of respondents Ray Thorton, et al. to respond filed.
3	Apr 6 1994		DISTRIBUTED. April 22, 1994 (Page 3)
5	Apr 8 1994		Order extending time to file response to petition until May 16, 1994.
6	Apr 21 1994		This extension is granted for all respondents.
7	May 12 1994		Waiver of right of respondent Dale Bumpers to respond filed.
8	May 16 1994		Waiver of right of respondent Democratic Party of Arkansas to respond filed.
9	May 16 1994		Brief of respondents Bobbie Hill, et al. in opposition filed.
16	May 16 1994	G	Motion of Citizens for Term Limits, et al. for leave to file a brief as amici curiae in No. 93-1828 filed.
10	May 20 1994		Waiver of right of respondent David Prior to respond filed.
11	May 23 1994		Brief of respondent Arkansas in support of petition filed. VIDED.
14	May 31 1994		Waiver of right of respondent Americans for Term Limits, et al. to respond filed. VIDED.
12	Jun 1 1994		REDISTRIBUTED. June 17, 1994 (Page 2)
17	Jun 3 1994	G	Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae in No. 93-1828 filed.
13	Jun 6 1994	X	Reply brief of petitioners U.S. Term Limits, et al. filed.
18	Jun 20 1994		Motion of Citizens for Term Limits, et al. for leave to file a brief as amici curiae in No. 93-1828 GRANTED.
19	Jun 20 1994		Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae in No. 93-1828 GRANTED.
20	Jun 20 1994		Petition GRANTED.
22	Jun 28 1994		***** Order extending time to file brief of petitioner on the merits until August 16, 1994.
27	Aug 15 1994		Brief amicus curiae of Governor John Engler filed.
45	Aug 15 1994		Brief amici curiae of Citizens for Term Limits, et al. filed. VIDED.
23	Aug 16 1994		Brief of petitioner Winston Bryant, Attorney General filed.

390

Entry	Date	Note	Proceedings and Orders
			VIDED.
26	Aug 16 1994	Brief amici curiae of Washington Legal Foundation, et al. filed. VIDED.	
28	Aug 16 1994	Brief amicus curiae of United States Justice Foundation filed. VIDED.	
29	Aug 16 1994	Joint appendix filed. VIDED.	
30	Aug 16 1994	Brief of petitioners U.S. Term Limits, et al. filed. VIDED.	
31	Aug 16 1994	Brief amicus curiae of Citizens United Foundation filed. VIDED.	
32	Aug 16 1994	Brief of respondents Jay Dickey and Tim Hutchinson in support of petition filed. VIDED.	
33	Aug 16 1994	Brief amici curiae of Alaska Committee for a Citizen Congress, et al. filed.	
34	Aug 16 1994	Brief amici curiae of Montain States Legal Foundation, et al. filed. VIDED.	
35	Aug 16 1994	Brief amicus curiae of Allied Educational Foundation filed.	
36	Aug 16 1994	Brief amici curiae of Nebraska, et al. filed. VIDED.	
37	Aug 16 1994	Brief amici curiae of People's Advocate, Inc., et al. filed. VIDED.	
38	Aug 16 1994	Brief of respondents Republican Party of Arkansas and W. Asa Hutchinson in support of petition filed. VIDED.	
39	Aug 16 1994	Brief amicus curiae of Washington filed. VIDED.	
46	Aug 16 1994	Brief amici curiae of Virginians for Term Limits, et al. filed. VIDED.	
54	Aug 16 1994	Brief amicus curiae of Congressional Term Limits Coalition, Inc. filed. VIDED.	
25	Aug 17 1994	Order extending time to file brief of respondent on the merits until October 17, 1994.	
49	Aug 19 1994	Record filed.	
		* Certified record proceedings Supreme Court of Arkansas and Circuit Court (BOX)	
43	Aug 23 1994	G Motion of petitioner Arkansas for divided argument and for additional time for oral argument filed.	
40	Aug 24 1994	D Motion of petitioners U. S. Term Limits, et al. for divided argument and for additional time for oral argument filed.	
47	Aug 31 1994	D Motion of respondents for divided argument and for additional time for oral argument filed.	
48	Aug 31 1994	G Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.	
50	Sep 26 1994	Motion of petitioner Arkansas for divided argument and for additional time for oral argument GRANTED. 0 additional minutes are allotted for this purpose.	
51	Sep 26 1994	Motion of petitioners U. S. Term Limits, et al. for divided argument and for additional time for oral argument DENIED.	
52	Sep 26 1994	Motion of respondents for divided argument and for additional time for oral argument DENIED.	
53	Sep 26 1994	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided	

Entry	Date	Note	Proceedings and Orders
			argument GRANTED.
55	Sep 30 1994	CIRCULATED.	
56	Oct 7 1994	SET FOR ARGUMENT TUESDAY, NOVEMBER 29, 1994. (1ST CASE).	
57	Oct 17 1994	X Brief amici curiae of California Democratic Party, et al. filed. VIDED.	
58	Oct 17 1994	X Brief of respondents Bobbie E. Hill, et al. filed. VIDED.	
59	Oct 17 1994	Waiver of right of respondent Dale Bumpers to respond filed. VIDED.	
60	Oct 17 1994	X Brief of respondent Ray Thorton filed. VIDED.	
61	Oct 17 1994	X Brief amicus curiae of Henry J. Hyde filed. VIDED.	
62	Oct 17 1994	X Brief amicus curiae of United States filed. VIDED.	
63	Oct 17 1994	X Brief amici curiae of League of Women Voters of the United States, et al. filed. VIDED.	
64	Oct 17 1994	X Brief amici curiae of American Civil Liberties Union, et al. filed. VIDED.	
65	Oct 20 1994	Waiver of right of respondent Democratic Party of Arkansas to respond filed. VIDED.	
66	Nov 16 1994	X Reply brief of petitioners U.S. Term Limits, et al. filed. VIDED.	
67	Nov 18 1994	X Reply brief of petitioner Bryant, Attorney General of Arkansas filed. VIDED.	
68	Nov 21 1994	X Reply brief of petitioners Jay Dickey and Tim Hutchinson filed. VIDED.	
69	Nov 22 1994	X Reply brief of petitioners Republican Party of Arkansas, et al. filed.	
70	Nov 29 1994	ARGUED.	

931456 MAR 17 1994
No. _____

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

U.S. TERM LIMITS, INC., ARKANSANS FOR
GOVERNMENTAL REFORM, INC., FRANK GILBERT,
GREG RICE, LON SCHULTZ, and SPENCER PLUMLEY,
Petitioners,

v.

RAY THORNTON, BLANCHE LAMBERT, DALE BUMPERS,
DAVID PRYOR, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the
Supreme Court of Arkansas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Article I of the Constitution forbid a state to decline to print on its election ballots the names of multi-term incumbents in the House of Representatives and Senate?

LIST OF PARTIES

Petitioners in this Court are U.S. Term Limits, Inc., Arkansans for Governmental Reform, Inc., Frank Gilbert, Greg Rice, Lon Schultz, and Spencer Plumley.

Respondents in this Court and parties to the proceeding in the Supreme Court of Arkansas are:

Representatives and Senators: Ray Thornton, Blanche Lambert, Dale Bumpers, David Pryor, Jay Dickey, and Tim Hutchinson.

State legislators: James C. "Jim" Scott, W.D. "Bill" Moore, Jr., Mike Ross, Wayne Dowd, Neely Cassady, George Hopkins, Jean C. Edwards, Jay Bradford, Travis A. Miles, Lu Hardin, Eugene "Bud" Canada, Charlie Cole Chaffin, Vic Snyder, Jerry D. Jewell, Cliff Hoofman, Stanley Russ, Mike Beebe, Roy C. "Bill" Lewellen, Mike Everett, Steve Bell, Allen Gordon, Jon S. Fitch, Morrill Harriman, Mike Bearden, Jerry P. Bookout, Mike Todd, Nick Wilson, Steve Luelf, Joe E. Yates, David R. Malone, Clarence Bell, Jack Anderson Gibson, Bill Gwatney, Reid Holiman, Railey A. Steele, Louis McJunkin, Jerry Hutton, B.G. Hendrix, Carolyn Pollan, Ralph "Buddy" Blair, Jr., W.R. "Bud" Rice, Ode Maddox, Gus Wingfield, Hoya D. Horn, David Beatty, Arthur Carter, Charles Whorton, Jr., Frank J. Willems, Lloyd R. George, Bob J. Watts, L.L. "Doc" Bryan, Bruce Hawkins, James C. Allen, John W. Parkerson, John H. Dawson, Billy Joe Purdom, Randy Thurman, W.H. "Bill" Sanson, Bill Stephens, H. Lacy Landers, Bobby G. Newman, Jodie Mahony, Phil Wyrick, Mark Pryor, Carol "Coach" Henry, James G. Dietz, Doug Wood, Mike Wilson, William H. Townsend, Larry Goodwin, John E. Miller, John Paul Capps, J. Sturgis Miller, Josetta E. Wilkins, Jacqueline J. Roberts, Charlotte Schexnayder, Jimmie Don McKissack, Michael K. Davis, Thomas G. Baker, Albert "Tom" Collier, V.O. "Butch" Calhoun, Wanda Northcutt, N.B. "Nap" Murphy, Jime Holland, Tim Wooldridge, Bobby G. Wood, Bobby L. Hogue, Owen Miller, J.L. "Jim" Shaver, Pat

Flanagin, Wayne Wagner, Christene Brownlee, Lloyd C. McCuiston, Jr., Bob McGinnis, Ernest Cunningham, Bynum Gibson, Jim Von Gremp, Dennis Young, Armil O. Curran, D.R. "Buddy" Wallis, Vada Sheid, Greg Wren, E. Ray Stalnaker, David Choate, Bill Fletcher, Marian D. Owens, and Claud V. Cash.

Others: State of Arkansas, Republican Party of Arkansas, Democratic Party of Arkansas, Bobbie E. Hill, on behalf of the League of Women Voters of Arkansas, Dick Herget, Americans for Term Limits, Steve Goss, W. Asa Hutchinson, George O. Jernigan, Jr., Mark Riable, and Bill Walters.

LIST PURSUANT TO RULE 29.1

Petitioner U.S. Term Limits, Inc. is a non-profit corporation incorporated under the laws of the District of Columbia. It has no parent companies or subsidiaries. Arkansans for Governmental Reform, Inc. is a not-for-profit corporation incorporated under the laws of Arkansas. It has no parent companies or subsidiaries. Americans for Term Limits is a not-for-profit corporation incorporated under the laws of Arkansas. On information and belief, it has no parent companies or subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
LIST PURSUANT TO RULE 29.1	iii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT	2
A. The Ruling on Ballot Regulation	4
B. The Ruling on Article I	5
REASONS FOR GRANTING THE WRIT	8
I. THIS IS A CASE OF UNUSUAL PUBLIC IMPORTANCE	8
II. THE DECISION IS IN CONFLICT WITH <i>STORER v. BROWN, CLEMENTS v. FASHING</i> , AND OTHER DECISIONS OF THIS COURT	9
A. Ballot Access Decisions	9
B. Qualification Decisions	12
C. Article I, § 4, Decisions	13
D. Tenth Amendment Decisions	15
III. THE DECISION CONFLICTS WITH DECISIONS OF THREE U.S. COURTS OF APPEALS	15
IV. THE DECISION CONFLICTS WITH DECISIONS OF OTHER STATE SUPREME COURTS	16
CONCLUSION	17

TABLE OF CONTENTS—Continued

APPENDICES	Page
A. Opinion of the Supreme Court of Arkansas (March 7, 1994)	1a
B. Orders of the Supreme Court of Arkansas denying rehearing (March 14, 1994)	44a
C. Opinion of the Circuit Court, Pulaski County, Arkansas (July 29, 1993)	45a
D. Opinion of the Circuit Court, Pulaski County, Arkansas (Sept. 8, 1993)	53a
E. Constitutional Provisions Involved	63a

TABLE OF AUTHORITIES

Cases:	Page
<i>American Party v. White</i> , 415 U.S. 767 (1974)	11
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	12
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973)	12
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	13
<i>Burdick v. Takushi</i> , 112 S. Ct. 2059 (1992)	13
<i>Clements v. Fashing</i> , 457 U.S. 957 (1982)	9, 12
<i>Davis v. Hildebrandt</i> , 241 U.S. 565 (1916)	13
<i>De Veau v. Braisted</i> , 363 U.S. 144 (1960)	13
<i>Duggan v. Beerman</i> , No. 485 (Dist. Ct., Lancaster Co., Neb., Sept. 28, 1992), <i>appeal pending</i> , No. S-92-907 (S. Ct. Neb.)	8
<i>Garcia v. San Antonio Metropolitan Transit Authority</i> , 469 U.S. 528 (1985)	15
<i>Gregory v. Ashcroft</i> , 111 S. Ct. 2395 (1991)	15
<i>Heavey v. Chapman</i> , 93 Wash. 2d 700, 611 P.2d 1256 (1980)	16
<i>Hopfmann v. Connolly</i> , 746 F.2d 97 (1st Cir. 1984), <i>vacated in part</i> , 471 U.S. 459 (1985)	5, 16
<i>INS v. Chadha</i> , 462 U.S. 919 (1983)	13
<i>Jenness v. Fortson</i> , 403 U.S. 431 (1971)	3, 11, 12
<i>Joyner v. Mofford</i> , 706 F.2d 1523 (9th Cir.), <i>cert. denied</i> , 464 U.S. 1002 (1983)	5, 16
<i>Legislature v. Eu</i> , 54 Cal. 3d 492, 816 P.2d 1309 (1991), <i>cert. denied</i> , 112 S. Ct. 1292 (1992)	13
<i>Lubin v. Panish</i> , 415 U.S. 709 (1974)	12
<i>Mandel v. Bradley</i> , 432 U.S. 173 (1977)	11
<i>Munro v. Socialist Workers Party</i> , 479 U.S. 189 (1986)	11
<i>Nixon v. United States</i> , 113 S. Ct. 732 (1993)	13
<i>Opinion of the Justices</i> , 413 Mass. 1201, 595 N.E.2d 292 (1992)	9
<i>Plante v. Smith</i> , No. 92-CV-40410 (U.S.D.C., N.D. Fla.)	8
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969)	5, 6, 12, 13
<i>Public Citizen, Inc. v. Miller</i> , 992 F.2d 1548 (11th Cir. 1993)	16
<i>Roudebush v. Hartke</i> , 405 U.S. 15 (1972)	14
<i>Smiley v. Holm</i> , 285 U.S. 355 (1932)	13, 14

TABLE OF AUTHORITIES—Continued

	Page
<i>State ex rel. Johnson v. Crane</i> , 65 Wyo. 189, 197 P.2d 864 (1948)	16
<i>State ex rel. McCarthy v. Moore</i> , 87 Minn. 308, 92 N.W. 4 (1902)	16
<i>State ex rel. O'Sullivan v. Swanson</i> , 127 Neb. 806, 257 N.W. 255 (1934)	16
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	3, 10, 11, 12, 14, 15
<i>Stumpf v. Lau</i> , 108 Nev. 826, 839 P.2d 120 (1992) ..	9
<i>Thorsted v. Gregoire</i> , Nos. C92-1768WD and C93-770WD (U.S.D.C., W.D. Wash., Feb. 10, 1994), appeals pending (Nos. 94-85222 and 94-85223, U.S.C.A., 9th Cir.)	8
<i>United States v. Classic</i> , 313 U.S. 299 (1941)	14
<i>Wilbur v. Mahan</i> , 3 F.3d 214 (7th Cir. 1993)	12

Constitutional Provisions:

U.S. Constitution, Article I, § 2	3, 4, 6, 7, 10, 11, 12, 14
Article I, § 3	5, 10
Article I, § 4	4, 13
Article I, § 5	13
Article I, § 6	5, 10
Article I, § 10	15
Article IV	3
Article VI	5, 10
First Amendment	3, 5, 12, 13
Tenth Amendment	4, 6, 15
Fourteenth Amendment	3, 5, 12, 13
Fifteenth Amendment	13
Seventeenth Amendment	10
Nineteenth Amendment	13
Twenty-fourth Amendment	13
Twenty-Sixth Amendment	13
Ariz. Const., Art. VII, § 18	8
Ark. Const., Amend. 73	2, passim
Colo. Const., Art. XVIII, § 9a	8
Fla. Const., Art. 6, § 4	8
Mich. Const., Art. 2, § 10	8

TABLE OF AUTHORITIES—Continued

	Page
Mo. Const., Art. III, § 45 (a)	8
Mont. Const., Art. IV, § 8	8
Neb. Const., Art. XV, § 19	8
Ohio Const., Art. V, § 8	8
Ore. Const., Art. II, § 20	8
S.D. Const., Art. III, § 32	8

Statutes:

Cal. Election Code, § 25003	8
Ga. Act of Jan. 23, 1789, p. 247	14
Mass. Res. of Nov. 20, 1788, ch. 49	14
Md. Act of Dec. 22, 1788, ch. 10, § VII	14
N.C. Act of Nov. 2, 1789, ch. 1, § I	14
N.D. Cent. Code § 16.1-01-13.1	8
N.J. Act of Nov. 21, 1788, ch. 241, § 3	14
Va. Act of Nov. 20, 1788, ch. 2, § II	14
Wash. Rev. Code § 29.68	8
Wyo. Stat. § 22-5-104	8

Miscellaneous:

M. CLARKE & D. HALL, CASES OF CONTESTED ELECTIONS IN CONGRESS (1834)	6
THE FEDERALIST (C. Rossiter ed. 1961)	5, 15
G. WILL, RESTORATION (1992)	9

IN THE
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OCTOBER TERM, 1993

No. _____

U.S. TERM LIMITS, INC., ARKANSANS FOR
GOVERNMENTAL REFORM, INC., FRANK GILBERT,
GREG RICE, LON SCHULTZ, and SPENCER PLUMLEY,
Petitioners,

v.

RAY THORNTON, BLANCHE LAMBERT, DALE BUMPERS,
DAVID PRYOR, *et al.,*
Respondents.

**Petition for a Writ of Certiorari to the
Supreme Court of Arkansas**

PETITION FOR A WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review
the judgment of the Supreme Court of Arkansas entered
in this case March 7, 1994.

OPINIONS BELOW

The opinions of the Circuit Court of Pulaski County,
Arkansas, entered July 29 and September 8, 1993, are

unreported. They are reproduced at A. 45a and 53a.¹ The opinion of the Supreme Court of Arkansas is not yet reported. It is reproduced at A. 1a.

JURISDICTION

The judgment of the Circuit Court of Pulaski County, Arkansas was entered September 8, 1993. A. 53a. The judgment of the Supreme Court of Arkansas was entered March 7, 1994, A. 1a, and rehearing was denied March 14, 1994. A. 44a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Pertinent portions of the Constitution of the United States are reproduced at A. 63a. Amendment 73 to the Constitution of Arkansas is reproduced at A. 68a.

STATEMENT

On November 3, 1992 the voters of Arkansas added Amendment 73 to their state constitution. The amendment declares that:

"The people of Arkansas find and declare that elected officials who remain in office too long become pre-occupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers."

The amendment provides that:

1. After being elected three times (six years) to the U.S. House of Representatives, or twice (twelve years) to the U.S. Senate, a person's name will not appear on the printed ballot for election to those respective offices, although such a person may nevertheless run for election to that office and serve if elected. *Id.*, § 3, A. 69a.

¹ References to "A." are to the appendices to this petition.

2. Term limits of varying length are set for a number of offices in the executive and legislative branches of the state government. *Id.*, § 2, A. 68a.

On November 13, 1992 this suit for declaratory judgment was filed in the Circuit Court of Pulaski County, Arkansas against various state officials. It alleged that Amendment 73 violated Article I, Article IV, and the First and Fourteenth Amendments of the United States Constitution, and that its adoption did not comply with Arkansas law. Petitioners intervened in support of the Amendment.²

In a final order entered September 8, 1993, A. 53a, incorporating conclusions of law entered July 29, 1993, A. 45a, the Circuit Court entered judgment holding Amendment 73 "void and invalid" for failure to comply with what the court held was a requirement of Arkansas law for an enacting clause. A. 61a. The court also concluded that none of Amendment 73's provisions violated the First or Fourteenth Amendments, but that its ballot restrictions on multi-term incumbents seeking reelection to the House or Senate would violate Article I of the Constitution of the United States. A. 59a-60a.

Petitioners appealed to the Supreme Court of Arkansas, arguing that the state-law holding had been in error; that the ruling as to Article I was contrary to holdings of this Court and others that ballot restrictions do not amount to qualifications for office, *e.g.*, *Storer v. Brown*, 415 U.S. 724 (1974), and *Jenness v. Fortson*, 403 U.S. 431 (1971); and that, in any event, Article I does not pro-

² Petitioners are two organizations and four Arkansas voters that sponsored or supported Amendment 73. Also supporting the Amendment were the state of Arkansas, the Republican Party of Arkansas, Representative Tim Hutchinson, Americans for Term Limits, Mark Riabie, W. Asa Hutchinson, and Steve Goss. The case was removed to the United States District Court for the Eastern District of Arkansas on March 4, 1993, and remanded to the state court on April 28, 1993.

hibit states from setting additional qualifications for election to Congress, which are also authorized by Article I, §§ 2 and 4, and the Tenth Amendment.

A. The Ruling on Ballot Regulation.

The Supreme Court of Arkansas issued five opinions, none of them joined by a majority. It unanimously reversed the Circuit Court's holding that Amendment 73 had not been adopted in compliance with state law. Then by a vote of 5-2 it held that insofar as Amendment 73 restricted ballot access for multi-term congressional incumbents, it violated Article I of the Constitution of the United States. In all other respects it held the amendment valid.

The plurality opinion, joined by three justices, acknowledged that under Amendment 73 a long-serving congressional incumbent "is not totally disqualified and might run as a write-in candidate" or serve after appointment to a vacancy. A. 15a. It added that sustaining this ballot provision as a regulation of the "Times, Places and Manner" of congressional elections under Article I, § 4, was "not without some rational appeal." A. 14a. However, it then disposed of that issue in one sentence, A. 15a:

"These glimmers of opportunity for those disqualified, though, are faint, indeed—so faint in our judgment that they cannot salvage Amendment 73 from constitutional attack."

In dissent, Special Chief Justice Cracraft concluded that with respect to congressional offices Amendment 73

"merely makes it more difficult for an incumbent to be elected. Under our liberal write-in laws, an incumbent can be elected to congressional office and, if elected, serve the term for which elected. . . . In my view, a person is qualified within the meaning of Article I of the United States Constitution if permitted to serve if elected."

A. 37a. He cited decisions of United States courts of appeals so holding: *Hopfmann v. Connolly*, 746 F.2d 97 (1st Cir. 1984), *vacated in part on other grounds*, 471 U.S. 459 (1985); and *Joyner v. Mofford*, 706 F.2d 1523 (9th Cir.), *cert. denied*, 464 U.S. 1002 (1983). *Id.* He concluded that likelihood of electoral success went only to the issue whether the provisions violated the First and Fourteenth Amendments, and that "the state's interest in preventing the perceived evils outweighs the First and Fourteenth Amendment rights." A. 39a.

B. The Ruling on Article I.

With respect to Article I, the plurality opinion acknowledged that "whether the States are foreclosed from adding a restriction to candidacy in the form of service limitations is not specifically addressed" in the Constitution, A. 12a, and that the constitutional history was "helpful but inconclusive." *Id.* However, the opinion concluded that to invalidate the state's ballot restriction on multi-term congressional incumbents "makes eminently good sense." A. 14a. It explained, citing no authority, that "[i]f there is one watchword for representation of the various States in Congress, it is uniformity," and "[p]iecemeal restrictions by State would fly in the face of that order." *Id.* The opinion stated that "[n]o other qualifications" than age, citizenship, and residency were included in the Constitution. A. 12a.³ It quoted a statement by Alexander Hamilton in *The Federalist* about lack of congressional power, A. 13a,⁴ and referred to an

³ But see *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969); U.S. Const., Art. I, § 3, cl. 7; Art. I, § 6, cl. 2; Art. VI, cl. 3.

⁴ "But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the times, the places, and the manner of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature."

THE FEDERALIST No. 60 at 371 (C. Rossiter ed. 1961) (first and final emphasis supplied).

1807 seating dispute in the House of Representatives. *Id.*⁵ Citing a committee report on that dispute about Maryland's law requiring district residency—a report which the full House later rejected⁶—the opinion concluded, *id.*:

“That Report clearly and specifically determined that the U.S. Constitution reserved no authority in the State legislature to change, add to or diminish the qualifications set forth in Article 1.”

Justice Dudley concurred in the holding, although noting that it

“is a close question and difficult issue. The articulate dissenting opinions of Justices Hays and Cracraft cause one to pause.”

A. 26a. Special Justice Brown, also concurring, agreed that “Justice Hays makes a strong case for ‘minimum’ rather than ‘exclusive’ qualifications,” and that

“whether the founding fathers intended to foreclose the states from imposing additional qualifications for Congressmen was not definitively and categorically settled.”

A. 41a. However, he emphasized that the Constitution itself did not require term limits, and therefore concluded as to the states that “the specter of the hodge-podge of qualifications which a contrary holding might engender is daunting enough to swing the balance.” *Id.*

Special Chief Justice Cracraft, dissenting, concluded that because Amendment 73 regulated only which names appear on the ballot, it did not involve Article I at all.

A. 37a. Justice Hays, also dissenting, began by noting that by the terms of the Tenth Amendment, “[t]he people

⁵ See *Powell v. McCormack*, *supra*, 395 U.S. at 541-48; see also *id.* at 545 (“congressional practice has been erratic”) (footnote omitted); *id.* at 547 (“we are not inclined to give its precedents controlling weight”).

⁶ See M. CLARKE & D. HALL, *CASES OF CONTESTED ELECTIONS IN CONGRESS* 169, 171 (1834).

of each state possess all powers which are not expressly or impliedly delegated to the federal government or which they are not prohibited from exercising by the United States Constitution.” A. 33a. He concluded that Article I would not be violated expressly or impliedly by a state limit on congressional terms. He emphasized that textually “the qualifications are to be the *minimum* requirements rather than the *exclusive* requirements,” A. 34a (emphasis in original), reasoning that the states had retained the power to set many varying qualifications for voters, and that

“Since the framers determined that the people of each state could establish requirements for their electors, it stands to reason that the qualifications in Article 1 are minimum requirements.”

A. 34a. Thus “the framers intended merely to insure that no state lowered the standards for being elected to the House of Representatives or Senate.” *Id.* Finally,

“While it is clear that the framers discussed term limits, I am not convinced that the failure to include term limits in the Constitution prohibits the people of the states from enacting term limits.”

A. 34a-35a. Rehearing was denied. A. 44a.

REASONS FOR GRANTING THE WRIT

I. THIS IS A CASE OF UNUSUAL PUBLIC IMPORTANCE.

In 1992 eight other states in addition to Arkansas enacted provisions that restrict multi-term congressional incumbents from having their names printed on ballots.⁷ An additional six states now limit the number of terms that an individual may serve in the House or Senate.⁸ It is expected that in November, 1994, initiatives to adopt similar laws will appear on election ballots in Alaska, Idaho, Maine, Massachusetts, Nevada, Oklahoma, and Utah. In addition, legislation to adopt ballot restrictions or term limits has passed the Utah legislature and the senate of New Hampshire. The term limits movement, embracing both printed ballot restrictions and term limitations, is the most significant grassroots political phenomenon of recent years.

Unable to defeat such proposals at the ballot box, opponents are turning increasingly to the courts to try to invalidate the voters' decision. Suits already have been brought challenging the constitutionality of such laws in three states besides Arkansas.⁹ All those courts recog-

⁷ Ariz. Const., Art. VII, § 18; Cal. Election Code § 25003; Fla. Const., Art. 6, § 4; Mont. Const., Art. IV, § 8; Neb. Const., Art. XV, § 19; N.D. Cent. Code § 16.1-01-13.1; Wash. Rev. Code § 29.68; Wyo. Stat. § 22-5-104. Enforcement of the Washington statute has been enjoined by a district court. *Thorsted v. Gregoire*, Nos. C92-1763WD and C93-770WD (U.S.D.C., W.D. Wash., Feb. 10, 1994), appeals pending (Nos. 94-35222 and 94-35223, U.S.C.A., 9th Cir.).

⁸ Colo. Const., Art. XVIII, § 9; Mich. Const., Art. II, § 10; Mo. Const., Art. III, § 45(a); Ohio Const., Art. V, § 8; Ore. Const., Art. II, § 20; S.D. Const., Art. III, § 32. The Colorado provision was adopted in 1990, the others in 1992.

⁹ *Duggan v. Beerman*, No. 485 (Dist. Ct., Lancaster Co., Neb., Sept. 28, 1992) (rejecting constitutional challenge), appeal pending, No. S-92-907 (S. Ct. Neb.); *Thorsted v. Gregoire*, *supra* (upholding constitutional challenge); *Plante v. Smith*, No. 92-CV-40410

nize that the issue is one that cannot be settled until this Court considers and resolves it. As the plurality opinion here observed, the answer "is not specifically addressed" in the Constitution. A. 12a. As a concurring justice added, this "is a close question and difficult issue." A. 26a. And it matters. It affects, ultimately, the way in which the people will be represented and the Congress of the United States will function.

II. THE DECISION IS IN CONFLICT WITH *STORER v. BROWN, CLEMENTS v. FASHING*, AND OTHER DECISIONS OF THIS COURT.

This Court has not previously had occasion to consider a challenge to a state law restricting ballot access for multi-term congressional incumbents; until recently, the people of the states had not concluded such laws were necessary.¹⁰ Many decisions of this Court, however, have upheld a variety of state laws regulating candidacy—both state laws denying ballot access to many categories of candidates, and state laws prohibiting designated officials from even running for Congress. The Arkansas decision is contrary to those decisions of this Court.

A. Ballot Access Decisions.

In holding that a ballot restriction which does not prohibit election or service is nevertheless a qualification for office, the decision conflicts with a well established

(U.S.D.C., N.D. Fla.) (preliminary motions pending). Cf. also *Stumpf v. Lau*, 108 Nev. 826, 829, 839 P.2d 120, 122 (1992) (3-2 decision) (barring from ballot a "straw poll" term-limit proposal "whose only purpose is to allow the people to express their views" and which majority said would violate Constitution); *Opinion of the Justices*, 413 Mass. 1201, 1217, 595 N.E.2d 292, 302 (1992) (declining to opine on this "highly complex" issue or to "predict the view the Supreme Court ultimately would take").

¹⁰ For most of the country's history, frequent elections provided considerable turnover in the House, as the Framers had anticipated. During the late Twentieth Century, however, the rate of incumbency grew sharply. See data collected in G. WILL, *RESTORATION* 73-89 (1992).

line of decisions of this Court. In *Storer v. Brown*, 415 U.S. 724 (1974), this Court heard a constitutional challenge to a California law that denied ballot access to independent congressional candidates who had been affiliated with a political party within the year preceding the election. Two such candidates argued at length that the law violated Article I, § 2, of the Constitution, on the theory that the disqualifications listed there (age, citizenship, inhabitancy¹¹) could not be added to by a state. This Court in upholding the state law disposed of that argument:

"Appellants also contend that [the state law] purports to establish an additional qualification for office of Representative and is invalid under Art. I, § 2, cl. 2, of the Constitution. The argument is wholly without merit. . . . The non-affiliation requirement no

¹¹ The Constitution provides:

"No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." (Art. I, § 2.)

"No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of the State for which he shall be chosen." (Art. I, § 3; see also Seventeenth Amendment.)

The Constitution also provides:

"Judgment in Cases of Impeachment shall not extend further than to removal from Office and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States" (Art. I, § 3.)

"[N]o Person holding any Office under the United States, shall be a member of either House during his Continuance in Office." (Art. I, § 6.)

"The Senators and Representatives before mentioned . . . shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." (Art. VI.)

more establishes an additional requirement for the office of Representative than the requirement that the candidate win the primary to secure a place on the general ballot or otherwise demonstrate substantial community support."

415 U.S. at 746 n.16. A series of similar decisions of this Court has likewise upheld a variety of state ballot regulations, including primary election laws, that prevent various categories of candidates from having their names on the printed ballot. In most of them, after *Storer v. Brown*, litigants did not even try to argue that such state ballot laws violate Article I. See, e.g., *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (barring from ballot candidates not receiving minimum vote in primary); see also *American Party v. White*, 415 U.S. 767 (1974) (barring from ballot candidates without sufficient petition support); *Jenness v. Fortson*, 403 U.S. 431 (1971) (same).

The plurality opinion rested its holding on an assumption that although Amendment 73 allows anyone to be elected by write-in votes, a write-in candidacy would have only a "glimmer" of opportunity to succeed. A. 14a. However, the record showed that write-in candidates for Congress had in fact succeeded in Arkansas in 1958 and 1960, and an expert affidavit rated the chances of success quite substantial for any write-in candidate who was a well known incumbent.

In simply assuming that denial of ballot access amounted to a bar to election, the Arkansas court did not follow the holdings of this Court in *Mandel v. Bradley*, 432 U.S. 173 (1977), and *Storer v. Brown*, *supra*. Both cases held that a court may not, as the Arkansas court did here, simply assume that an election law casts undue burdens on particular candidates, but instead must base such a decision on actual findings of fact. *Mandel*, *supra*, 432 U.S. at 178; *Storer*, *supra*, 415 U.S. at 740 ("further proceedings should be had in the District Court to

permit further findings with respect to the extent of the burden").¹²

B. Qualification Decisions.

In holding that Article I by unstated implication prohibits a state law adding qualifications for congressional office, the decision conflicts with cases in which this Court has upheld state laws that prohibit identified groups of individuals—generally, state officeholders—from running for or serving in Congress. See, e.g., *Clements v. Fashing*, 457 U.S. 957 (1982) (prohibition on state judges running for Congress); cf. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Those decisions held that state disqualification laws that did not burden a particular political viewpoint were permissible under the First and Fourteenth Amendments; they did not so much as hint that such laws raised any question under Article I. Indeed, it has been "settled doctrine" that "a public body may forbid its employees to run for elective office," including "policymaking officials." *Wilbur v. Mahan*, 3 F.3d 214, 219 (7th Cir. 1993) (concurring opinion).¹³

¹² On several occasions this Court has held that the availability of a write-in candidacy is sufficient as a matter of law to satisfy Fourteenth Amendment concerns. See, e.g., *Storer v. Brown*, supra, 415 U.S. at 736 n.7 ("the independent candidate who cannot qualify for the ballot may nevertheless resort to the write-in alternative"); *Jenness v. Fortson*, supra, 403 U.S. at 434 ("no limitation whatever . . . on the right of a voter to write in on the ballot the name of the candidate of his choice and to have that write-in vote counted"). Availability of a write-in procedure has not been sufficient to cure discrimination against persons unable to pay a filing fee, or when a filing date effectively prevented support of particular views. See *Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974) (decided same day as *Storer v. Brown*); *Anderson v. Celebrezze*, 460 U.S. 780, 792 n.12, 799 n.26 (1983); see also *Lubin v. Panish*, supra, 415 U.S. at 722 (Blackmun, J., joined by Rehnquist, J., concurring) ("I would regard a write-in procedure, free of fee, as an acceptable alternative").

¹³ *Powell v. McCormack*, 395 U.S. 486 (1969), which the Arkansas plurality opinion cited, did not address state regulation, and in

C. Article I, § 4, Decisions.

In yet another line of cases, this Court has often noted that Article I, § 4, reserves to the states broad power to regulate elections for Congress,¹⁴ subject only to overriding laws that Congress pursuant to the same section may enact.¹⁵ Under Article I, § 4, this Court has explained,

"the States have evolved comprehensive, and in many respects complex, election codes regulating in most

fact explicitly put this issue aside. See 395 U.S. at 543. *Powell* held only that when sitting as "Judge" of the qualifications of its own members pursuant to Article I, § 5, a single House could not enact additional qualifications. See also *Nixon v. United States*, 113 S. Ct. 732, 740 (1993); cf. *INS v. Chadha*, 462 U.S. 919 (1983). Subsequently this Court assumed that by the prescribed legislative process Congress might enact laws adding qualifications, see *Buckley v. Valeo*, 424 U.S. 1, 133 (1976), and in *De Veau v. Braisted*, 363 U.S. 144, 159 (1960), it was noted that Congress has in fact done so "frequently and of old." (Opinion of Frankfurter, J., announcing judgment.)

¹⁴ "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

U.S. Const., Art. I, § 4. The reference "by the Legislature thereof" includes initiatives and other state methods of enactment. *Smiley v. Holm*, 285 U.S. 355, 372 (1932); *Davis v. Hildebrand*, 241 U.S. 565, 569-70 (1916).

¹⁵ State laws are also subject, of course, to later constitutional provisions regulating elections, including the Fourteenth, Fifteenth, Nineteenth, Twenty-fourth and Twenty-sixth Amendments. The Arkansas court's holding that Amendment 73 does not violate the First or Fourteenth Amendments is consistent with many holdings of this Court that "[i]t does not follow . . . that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." *Burdick v. Takushi*, 112 S. Ct. 2059, 2063 (1992); see also, e.g., *Legislature v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309 (1991), cert. denied, 112 S. Ct. 1292, 1293 (1992).

substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and *the selection and qualification of candidates.*"

Storer v. Brown, *supra*, 415 U.S. at 730 (emphasis supplied). "It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections. . . ." *Roudebush v. Hartke*, 405 U.S. 15, 24-25 (1972), quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1931). The first clause of Article I, § 2, establishes that "the People" of the states shall choose who shall be their representatives; here, by initiative election, the people of Arkansas did so.

"[T]he states are given . . . a wide discretion in the formulation of a system for the choice by the people of representatives in Congress.

* * * *

"[T]he states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4. . . ."

United States v. Classic, 313 U.S. 299, 311, 315 (1941).¹⁶ The Framers "gave the States a role in the selection of both the Executive and Legislative Branches of the Federal Government" to "protect the States from

¹⁶ In fact, many of the same state legislatures that ratified the Constitution immediately enacted a variety of added qualifications for Representatives, including property ownership and residency in a particular district. See Va. Act of Nov. 20, 1788, ch. 2, § II (property requirement and district residency requirement); Ga. Act of Jan. 23, 1789, p. 247 (three-year district residency requirement); N.C. Act of Nov. 2, 1789, ch. 1, § I (one-year district residency requirement); Md. Act of Dec. 22, 1788, ch. 10, § VII (district residency requirement); Mass. Res. of Nov. 20, 1788, ch. 49 (district residency requirement); N.J. Act of Nov. 21, 1788, ch. 241, § 3 (preliminary nomination requirement).

overreaching by Congress." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 551 (1985).

D. Tenth Amendment Decisions.

Further, this Court in *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991), recognized that under the Tenth Amendment the powers which "remain in the State governments are numerous and indefinite," quoting *The Federalist* No. 45 at 292-93 (C. Rossiter ed. 1961). "It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress." *Garcia*, *supra*, 469 U.S. at 550-51 (footnote omitted).

Under *Gregory* and *Garcia*, the Arkansas court was not at liberty to read a prohibition on state authority into the Constitution because the court believed it "makes eminently good sense." A. 14a. The ordinary rule of constitutional interpretation, commanded by the Tenth Amendment, is that limitations on state power implied from textual silence are not favored, that state laws like federal enjoy a presumption of constitutionality, and that when the Framers wanted to prohibit states from doing something, they knew how to say so. See, *e.g.*, the specific prohibitions on state laws in U.S. Const., Art. I, § 10.

III. THE DECISION CONFLICTS WITH DECISIONS OF THREE U.S. COURTS OF APPEALS.

Repeatedly the courts of appeals have held, consistently with *Storer v. Brown*, *supra*, and contrary to the Arkansas Supreme Court here, that a state law preventing printing of a candidate's name on a ballot is not a qualification for holding office and does not implicate Article I. As the First Circuit ruled, in a case relied on by one of the dissenting opinions, A. 37a,

"The test to determine whether or not the 'restriction' amounts to a 'qualification' . . . is whether the candidate 'could be elected if his name were written in by a sufficient number of electors.'"

Hopfmann v. Connolly, 746 F.2d 97, 103 (1st Cir. 1984), *vacated in part on other grounds*, 471 U.S. 459 (1985) (quoting in part *State ex rel. Johnson v. Crane*, 65 Wyo. 189, 206-07, 197 P.2d 864, 871 (1948)). The same has been held by the Ninth and Eleventh Circuits. *Joyner v. Mofford*, 706 F.2d 1523, 1531 (9th Cir.), *cert. denied*, 464 U.S. 1002 (1983) (also cited in the dissent); *Public Citizen, Inc. v. Miller*, 992 F.2d 1548 (11th Cir. 1993), *affirming and adopting* 813 F. Supp. 821, 832 (N.D. Ga. 1993).

IV. THE DECISION CONFLICTS WITH DECISIONS OF OTHER STATE SUPREME COURTS.

State supreme courts have ruled like the federal courts of appeals. In a frequently cited case, the Supreme Court of Nebraska explained that ballot restrictions do not establish qualifications within the meaning of Article I, even if Article I would by implication prohibit such qualifications:

"[T]he question is not whether he may be a candidate, but whether he may . . . have his name printed on the ballot at the state's expense. He may be a candidate and if electors write his name on the ballot in sufficient numbers he will be elected. . . . The state statute in no manner seeks to add other qualifications. It does not prevent him from being a candidate. It is not unconstitutional."

State ex rel. O'Sullivan v. Swanson, 127 Neb. 806, 808-10, 257 N.W. 255, 255-56 (1934). *Accord, e.g., State ex rel. McCarthy v. Moore*, 87 Minn. 308, 92 N.W. 4 (1902). See also *Heavey v. Chapman*, 93 Wash. 2d 700, 611 P.2d 1256 (1980) (upholding primary law).

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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March 17, 1994

APPENDICES

1a

APPENDIX A

SUPREME COURT OF ARKANSAS

No. 93-1240

U.S. TERM LIMITS, INC., et al.,
Appellants,

v.

BOBBIE E. HILL, et al.,
Appellees,

Appeal from the Pulaski County Circuit Court
No. 92-6171, HON. CHRIS PIAZZA, Judge

Opinion Delivered Mar. 7, 1994

REVERSED IN PART; AFFIRMED IN PART.

ROBERT L. BROWN, Associate Justice

This case concerns the validity of Amendment 73 to the Arkansas Constitution, which establishes limitations on the number of terms that can be served by state constitutional officers, and state legislators, and limitations on the eligibility of candidates for the U.S. Senate and U.S. House of Representatives to have their names placed on the election ballot. Amendment 73 was proposed as an initiated petition by the people of the State under Amendment 7 of the Arkansas Constitution and approved in the General Election on November 3, 1992, by a vote of 494,326 to 330,836.

2a

The proposal, as it appeared on the ballot and was voted on at the General Election, read as follows:

**PROPOSED CONSTITUTIONAL
AMENDMENT NO. 4**

(Proposed by Petition of the People)

(Popular Name)

**ARKANSAS TERM LIMITATION
AMENDMENT**

(Ballot Title)

An Amendment to the Constitution of the State of Arkansas limiting the number of terms that may be served by the elected officials of the Executive Department of this state to two (2) four-year terms, this department to consist of a Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, Commissioner of State Lands; limiting the number of terms that may be served by members of the Arkansas House of Representatives to three (3) two-year terms, these members to be chosen every second year; limiting the number of terms that may be served by members of the Arkansas Senate to two (2) four-year terms, these members to be chosen every four years; providing that any person having been elected to three (3) or more terms as a member of the United States House of Representatives from Arkansas shall not be eligible to appear on the ballot for election to the United States House of Representatives from Arkansas; providing that any person having been elected to two (2) or more terms as a member for the United States Senate from Arkansas shall not be eligible to appear on the ballot for election to the United States Senate from Arkansas; providing for an effective date of January 1, 1993; and making the provisions applicable to all persons thereafter seeking election to the specified offices.

3a

FOR Proposed Constitutional Amendment

No. 4 ☐

AGAINST Proposed Constitutional Amendment

No. 4 ☐

The text and description of the full Amendment which were published and included in the initiative petition but not on the ballot read:

SUMMARY:

This amendment provides a limit of two (2) terms for the Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General and Commissioner of State Lands. It provides a limit of three (3) terms for State Representatives, and a limit of two (2) terms for State Senators. It also provides that persons having been elected three (3) or more terms as a member of the United States House of Representatives from Arkansas shall not be eligible to appear on the ballot for election to the United States House of Representatives from Arkansas. Lastly, it provides that any person having been elected to two (2) or more terms as a member of the United States Senate from Arkansas shall not be eligible to appear on the ballot for election to the United States Senate from Arkansas.

PREAMBLE:

The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the

people of Arkansas, exercising their reserved powers, herein limit the terms of the elected officials.

SECTION 1—Executive Branch

(a) The Executive Department of the State shall consist of a Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, all of whom shall keep their offices at the seat of government, and hold their offices for the term of four years, and until their successors are elected and qualified.

(b) No elected officials of the Executive Department of this State may serve in the same office more than two such four-year terms.

SECTION 2—Legislative Branch

(a) The Arkansas House of Representatives shall consist of members to be chosen every second year by the qualified electors of the several counties. No member of the Arkansas House of Representatives may serve more than three such two year terms.

(b) The Arkansas Senate shall consist of members to be chosen every four years by the qualified electors of the several districts. No member of the Arkansas Senate may serve more than two such four-year terms.

SECTION 3—Congressional Delegation

(a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas.

(b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas.

SECTION 4—Severability

The provisions of this Amendment are severable, and if any should be held invalid, the remainder shall stand.

SECTION 5—Provisions Self-Executing

Provisions of the Amendment shall be self-executing.

SECTION 6—Application

(a) This Amendment to the Arkansas Constitution shall take effect and be in operation on January 1, 1993, and its provisions shall be applicable to all persons thereafter seeking election to the offices specified in this Amendment.

(b) All laws and constitutional provisions which conflict with this Amendment are hereby repealed to the extent that they conflict with this amendment.

The text of the entire Amendment was published prior to the election as required by law. Ark. Const. amend. 7. "Initiative;" Ark. Code Ann. § 7-9-113 (1987).

On November 13, 1992, appellees Bobbie Hill on behalf of herself and the League of Women Voters of Arkansas filed a complaint for declaratory judgment in Pulaski County Circuit Court seeking to invalidate Amendment 73 on several grounds: (1) the Amendment violates article 1 of the U.S. Constitution by adding an additional qualification for election to the U.S. House of Representatives and the U.S. Senate; (2) the sections of the

Amendment are inherently nonseverable and the unconstitutionality of section 3 voids the entire Amendment; (3) the Amendment did not contain an Enacting Clause in violation of Amendment 7 of the Arkansas Constitution.

The original defendants named in the complaint were incumbent State constitutional officers and legislators, U.S. senators and representatives currently in office, the State Democratic Party, the State Republican Party, and the State Board of Election Commissioners. Many of the incumbent State legislators combined their efforts in this matter under the title of Unified Members. Thereafter, other parties intervened. The State of Arkansas through the State Attorney General's office intervened as a party defendant and was joined by various organizations that were proponents of the Amendment: U.S. Term Limits, Inc., Arkansans for Governmental Reform, and Americans for Term Limits, as well as their representatives. An Amended Complaint was subsequently filed adding Dick Herget, a political supporter of U.S. Congressman Ray Thornton, who has previously served three terms in the U.S. House of Representatives, as a party plaintiff. Plaintiff/appellee Bobbie Hill was described as a political supporter of State Representative John Dawson, who has previously served seven terms in the State House of Representatives.

Appellees Hill and Herget joined by U.S. Congressman Ray Thornton and the State Democratic Party moved for summary judgment to void Amendment 73 in accordance with the Amended Complaint. The Unified Members filed a similar motion. The State of Arkansas and Arkansans for Governmental Reform moved to Dismiss the Complaint for lack of justiciability. Intervenor U.S. Term Limits moved for summary judgment on grounds that Amendment 73 was valid in all respects.

A hearing ensued on July 29, 1993, and the circuit court handed down its Conclusions of Law that same date which are summarized:

1. The matter is justiciable based on the adverse impact of Amendment 73 on incumbent officeholders and on appellees Hill's and Herget's right to participate in the political process.

2. The omission of an Enacting Clause in the Amendment was a fundamental error and fatal defect in the Amendment.

3. Amendment 73 is a restriction on the qualifications of persons seeking federal congressional offices and violates the U.S. Constitution.

4. The power to limit the terms of State legislative and executive officers vests with the people through a properly drafted initiative.

5. The provisions applying term limits to State officeholders were severable and not inextricably linked to term limits on the federal delegation.

A document entitled Findings of Fact, Conclusions of Law, and a Final Order which embraced the Conclusions of Law of July 29, 1993, was entered on September 8, 1993. The principal finding of fact on September 8, 1993, was that Amendment 73 contained no Enacting Clause. For that reason the court reiterated its conclusion that the Amendment failed to pass muster under the Arkansas Constitution and declared it void. In the Final Order, the court also ruled that Section 3 pertaining to U.S. senators and representatives violated the Qualifications clauses of the U.S. Constitution, but that Section 3 was severable from Sections 1 and 2 which deal with state elected officeholders.

1. JUSTICIABILITY

Several appellants including U.S. Term Limits, Inc., Arkansans for Governmental Reform, the State of Arkansas, and Americans for Term Limits contend on appeal that this matter is not justiciable because appellees Hill and Herget and the affected state and federal officeholders

have not been adversely impacted by Amendment 73 and, hence, the case is not ripe for decision. Appellants' justiciability argument hinges on the fact that no elections have yet been held where state or federal candidates have been excluded, and no rights to association and speech in appellees Hill and Herget at this juncture have been impaired. They argue that Amendment 73 is prospective and, accordingly, only terms of service after January 1, 1993, will be counted for eligibility purposes. They maintain, in short, that if past terms of service are counted, this would be giving retroactive effect to Amendment 73.

Our law is clear that declaratory relief will lie where (1) there is a justiciable controversy; (2) it exists between parties with adverse interests; (3) those seeking relief have a legal interest in the controversy; and (4) the issues involved are ripe for decision. *UHS of Ark., Inc. v. City of Sherwood*, 296 Ark. 97, 752 S.W.2d 36 (1988); *Cummings v. City of Fayetteville*, 294 Ark. 151, 741 S.W.2d 638 (1987); *Andres v. First Ark. Development Finance Corp.*, 230 Ark. 594, 324 S.W.2d 97 (1959).

We have no problem concluding that appellees Hill and Herget have standing to mount this action for declaratory relief and that the case is ripe for determination. Surely, the ability of Hill and Herget to participate in the political process on behalf of certain candidates and as voters for those same candidates is in jeopardy which brings into play impairment of speech and association rights under the First and Fourteenth Amendments. *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Thorsted v. Gregoire*, C93-770WD (W.D.D.C. Wash. Feb. 10, 1994) The same holds true for the League of Women Voters of Arkansas, which has standing to participate on behalf of its voter-members. *Thorsted v. Gregoire, supra*. For the officeholders themselves, both state and federal, the uncertainty over what the future holds is even more daunting. Some officeholders do not know whether they will be foreclosed from seeking election as early as this election year.

A case and controversy rages among the various parties to this action, including numerous elected officials, over the effectiveness of Amendment 73 and its application. It is a matter of significant public interest, involving issues of constitutional law. See *Bryant v. English*, 311 Ark. 187, 842 S.W.2d 21 (1992). Because of the far-reaching impact of the issue and the potential for an imminent impairment of the legitimate interests of elected officeholders and their supporters occasioned by the Amendment, the matter is ripe for adjudication and justiciable.

II. ENACTING CLAUSE

We turn next to the facet of this case on which the circuit court predicated its decision—the absence of an Enacting Clause in Amendment 73. Amendment 7 to the Arkansas Constitution sets the following requirement:

Enacting Clause—The style of all the bills initiated and submitted under the provisions of this section shall be, "Be It Enacted by the People of the State of Arkansas" (municipality, or county as the case may be). In submitting measures to the people, the Secretary of State and all other officials shall be guided by the general election laws or municipal laws, as the case may be, until additional legislation is provided therefor.

The circuit court found that the omission of the Enacting Clause was fatal to Amendment 73 and voided it on that basis.

The appellants vehemently attack this ruling on several grounds: (1) appellees Hill and Herget waged, in essence, a contest over the sufficiency of the initiated petition with their Enacting Clause argument, and the circuit court had no jurisdiction over sufficiency matters; (2) Amendment 7 speaks of the style of all "bills" needing Enacting Clauses, and "bills" is a legislative term which does not include constitutional amendments; (3) the requirements of Amend-

ment 7 are directory post-election and not mandatory; and (4) there was substantial compliance with the requirements of Amendment 7.

We believe that the declaratory judgment action which raised the Enacting Clause issue and the validity of Amendment 73, post-election, was appropriately before the circuit court and that that court had jurisdiction to hear the matter. We, therefore, turn to the language of Amendment 7 itself.

Under the title "Initiative," Amendment 7 reads:

The first power reserved by the people is the initiative. Eight percent of the legal voters may propose *any law* and ten per cent may propose a *Constitutional Amendment* by initiative petition, and every such petition shall include the full text of the measure so proposed. (Emphasis ours.)

The people of this State may propose either laws or constitutional amendments by initiative petition. The law-making power given to the people to propose and adopt laws by initiative petition was intended to supplement existing legislative authority in the General Assembly. See *Ferrell v. Keel*, 105 Ark. 380, 151 S.W. 269 (1912). That power, though, is not what is involved in the case before us. Here, we are concerned with an initiative petition to amend the Arkansas Constitution, which is a separate matter altogether.

In common legal parlance, a "bill" is a draft of an act of the legislature before it becomes law. *Black's Law Dictionary* 167 (6th ed. 1991). Under Amendment 7, the people of this State have the power to enact "bills" into laws by direct vote. The term "bills" as used in the Enacting Clause section of Amendment 7 does not refer to statewide constitutional amendments but only to initiated proposals where the people are seeking to enact their own laws. Our case law recognizes that Amendment 7 requires an Enacting Clause for initiated bills by

the people. *Hailey v. Carter*, 221 Ark. 20, 251 S.W.2d 826 (1952). That is because the people, as opposed to the General Assembly, are enacting the laws under their initiative power. But, again, the same does not hold true for constitutional amendments. We are aware of no case in Arkansas holding that an Enacting Clause is required for a proposed statewide constitutional amendment.

The circuit court failed to make this distinction, but the Enacting Clause provision makes it clear by referring to bills. In the case before us, Amendment 73 was published as required by law and adopted by a wide majority of those voting on the issue. The ballot title stated that it was "Proposed by Petition of the People." It was abundantly clear that this was a proposed amendment to the Arkansas Constitution to put term limits into effect.

In sum, Amendment 7 makes no requirement for an enacting clause for statewide initiated petitions to amend the Arkansas Constitution, and we so hold. We reverse the circuit court on this point.

III. QUALIFICATIONS CLAUSE

We next address the issue of whether the State of Arkansas can render certain incumbent U.S. senators and representatives ineligible to appear on the ballot for their respective positions. We conclude that such a restriction on eligibility to stand for election to the U.S. Congress is violative of the respective Qualification clauses of Article 1 of the U.S. Constitution. Those clauses read:

§ 2. House of representatives.

* * * *

[2.] No person shall be representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

* * * *

§ 3. Senate.

* * * *

[3.] No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of the state for which he shall be chosen.

U.S. Const. art 1, § 2, cl. 2 and § 3, cl. 3.

The parties in this case have taken considerable pains to educate this court on the history of the respective Qualification clauses and the original intent of the framers of the U.S. Constitution. We find the history to be helpful but inconclusive regarding the issue at hand. We can glean from the history that a provision to require the rotation, as it was called, of senators and representatives was discussed and debated and ultimately discarded at the Constitutional Convention as a formal provision of the U.S. Constitution. C. Warren, *The Making of the Constitution* (1928). No doubt that evinces a decision on the part of the framers not to mandate rotation, or term limits. At the same time, whether the States are foreclosed from adding a restriction to candidacy in the from of service limitations is not specifically addressed. Under the previous Articles of Confederation, individual States had this authority, and delegates to Congress were limited to a term of three years. Art. Conf. V (1777). The framers of the U.S. Constitution did not expressly endow the States with this same authority. Indeed, the Constitutional Convention of 1787 defeated a proposal for the States to set property qualifications for service in Congress. C. Warren, *The Making of the Constitution* 418 (1928).

The ultimate document proposed by the framers and ratified by the States as the U.S. Constitution enumerated three benchmarks for congressional service—age, citizenship, and residency. No other qualifications were included. When the House of Representatives attempted

to add one more by refusing to seat one of its own members in 1967, Rep. Adam Clayton Powell, for wrongfully diverting federal funds to himself, his wife, and staff, the United States Supreme Court scuttled the effort. *Powell v. McCormack*, 395 U.S. 486 (1969). In doing so, the Court quoted Alexander Hamilton, who was answering an antifederalist charge during the ratification process that the proposed U.S. Constitution favored the wealthy and propertied interests:

The truth is that there is no method of securing to the rich the preference apprehended but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, the *manner* of elections. *The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.* The Federalist Papers 371 (Mentor ed 1961). Emphasis in last sentence added.)

395 U.S. at 539.

The Legislature referenced by Hamilton was the Congress, but it is his allusion to the fixed and immutable character of the enumerated qualifications that is illuminating today. In that same decision, *Powell v. McCormack*, the Court made mention of a Report by the House Committee on Elections regarding the eligibility of William McCreery to sit in Congress. The issue concerned an additional residency requirement imposed by the State of Maryland that disqualified him. That Report clearly and specifically determined that the U.S. Constitution reserved no authority in the State legislatures to change, add to, or diminish the qualifications set forth in Article 1. 395 U.S. at 542-543, citing 17 *Annals of Cong.* 871-872 (1807).

Qualifications set out in the U.S. Constitution, unalterable except by amendment to that document, is a conclusion that makes eminently good sense. If there is one watchword for representation of the various States in Congress, it is uniformity. Federal legislators speak to national issues that affect the citizens of every state. Additional age restrictions, residency requirements, or sundry experience criteria established by the States would cause variances in this uniformity and lead to an imbalance among the states with respect to who can sit in Congress. This is precisely what we believe the drafters of the U.S. Constitution intended to avoid. The uniformity in qualifications mandated in Article 1 provides the tenor and the fabric for representation in the Congress. Piecemeal restrictions by State would fly in the face of that order.

The appellants raise a corollary argument. They urge that Amendment 73 is merely a ballot access amendment and not a mandate establishing an additional qualification. No doubt some effort was made by the drafters of Amendment 73 to couch it in terms of eligibility "to appear on the ballot" rather than as a disqualification. And organizing and overseeing the time, place, and manner of elections clearly falls within the province of the States under the U.S. Constitution. U.S. Const. art. 1, § 4. Provisions, for example, requiring state officials to resign before running for federal office have been upheld as merely falling within the general power of the states to regulate federal elections. *See, e.g., Joyner v. Mofford*, 706 F.2d 1523 (9th Cir.), *cert. denied*, 464 U.S. 1002 (1983).

This effort to dress eligibility to stand for Congress in ballot access clothing, that is, as a regulatory measure falling within the State's ambit under Article 1, § 4, is not without some rational appeal. We do not agree, however, that excluding a broad category of persons from seeking election to Congress is a mere exercise of regu-

latory power. The intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service. We do recognize that an ineligible congressman under Amendment 73 is not totally disqualified and might run as a write-in candidate for Congress or receive a gubernatorial appointment to fill a vacancy in the same body. Following this thread, the appellants posit that term limitations do not mean disqualification—only ineligibility to be placed on the ballot as a candidate for certain offices. These glimmers of opportunity for those disqualified, though, are faint indeed—so faint in our judgment that they cannot salvage Amendment 73 from constitutional attack. *See Thorsted v. Gregoire*, C93-770WD (W.D.D.C. Wash. Feb. 10, 1994).

An additional qualification has been added to congressional eligibility. The list now reads age, nationality, residency, and prior service. Term limitations for congressional representation may well have come of age. But to institute such a change, an amendment to the U.S. Constitution is required, ratified by three-fourths of the states. U.S. Const. art 5. In sum, the Qualification clauses fix the sole requirements for congressional service. This is not a power left to the States under the Tenth Amendment. The attempt to add an additional criterion based on length of service is in direct conflict with the Qualification clauses, and the Supremacy Clause pertains. Section 3 is stricken from Amendment 73.

IV. SEVERABILITY

Because we strike down Section 3 of Amendment 73, we must now address the issue of whether this jeopardizes the entire Amendment. The argument is made by the Unified Members that it does because the provisions relating to federal legislators and to state officeholders and legislators are inextricably linked irrespective of the presence of a severability clause in the Amendment. The

Unified Members further stress that Amendment 73 was packaged as one plan.

Section 4 of the Amendment reads: "The provisions of this Amendment are severable, and if any should be held invalid, the remainder shall stand." The circuit court ruled on this issue twice. In its first opinion dated July 29, 1993, this conclusion was reached:

Section 3, of the term limit amendment which is the constitutionally invalid provision is linked to state term limits on (sic) only in theme, a theme that the voters overwhelmingly approved by initiative. To hold that the provisions are "inextricably linked" per the analysis in *Hasha*¹ this Court would have to conclude that the voters dislike for the federal deligation was overwhelming to the extent that they forced term limits upon state officials, an analysis that this Court cannot make.

Later, in its Final Order of September 8, 1993, the court ruled:

5. Sections 1 and 2 of Amendment 73 are not invalid because they were combined with unconstitutional limits on United States Senators and Representatives.

6. The court cannot conclude that the voter's dislike for incumbent United States Senators and Representatives was overwhelming to the extent that it caused voters to impose state limits on officers, senators and representatives.

7. Sections 1 and 2 of Amendment 73 are severable from Section 3 pursuant to the severability clause in Section 6 thereof.

¹ *Hasha v. City of Fayetteville*, 311 Ark. 460, 845 S.W.2d 500 (1993).

Our cases over the years have been consistent in examining the severability issue. In determining whether the invalidity of part of the act is fatal to the entire legislation, we have looked to 1) whether a single purpose is meant to be accomplished by the act; and 2) whether the sections of the act are interrelated and dependent upon each other. *Borchert v. Scott*, 248 Ark. 1050-H, 460 S.W.2d 28 (1970) (supplemental opinion on rehearing); *Faubus v. Kinney*, 239 Ark. 443, 389 S.W.2d 887 (1965); *Nixon v. Allen*, 150 Ark. 244, 234 S.W. 45 (1921); *Cotham v. Coffman*, 111 Ark. 108, 163 S.W. 1183 (1914). In *Faubus v. Kinney*, we noted that it is important whether the portion of the action remaining is complete in itself and capable of being executed wholly independent of that which was rejected. Clearly, when portions of an act are mutually connected and interwoven, severance is not appropriate. *Wenderoth v. City of Ft. Smith*, 251 Ark. 342, 472 S.W.2d 74 (1971).

The presence of a severability clause is a factor to be considered but, by itself, it may not be determinative. In *Combs v. Glen Falls Insur. Co.*, 237 Ark. 745, 375 S.W. 2d 809 (1964), we stated that a severability clause may be an aid to the courts in construction of a statute but in the words of Justice Brandeis, it is not "an inexorable command." 237 Ark. at 748, 375 S.W.2d at 810, citing *Dorchy v. Kansas*, 264 U.S. 286 (1924). In *Combs*, we concluded that the clause could not salvage the act of the General Assembly in question, and we voided the entire act.

Recent authority indicates that other jurisdictions subscribe to the same basic principles for determining severability as we in Arkansas. See *Board of Natural Resources v. Brown*, 992 F.2d 937 (9th Cir. 1993); *Gerken v. Fair Political Practices Comm'n*, 863 P.2d 694 (Cal. 1993); *Legislature of the State of California v. Eu*, 816 P.2d 1309 (Cal. 1991), cert. denied, 112 S.Ct. 1292 (1992). In *Brown*, the Ninth Circuit focused on whether the uncon-

stitutional portion of the act was functionally independent and, secondly, on whether the Congress would have enacted the law without the unconstitutional provision. In *Legislature of the State of California v. Eu*, the California Supreme Court proposed a test with three facets for severability—whether the invalid portion of the measure was grammatically, functionally, and volitionally separable from the remainder. By volitionally separable, the court meant whether the people would have voted for it independent of the invalid provisions. The court in *Eu* considered the severability of a void provision in a constitutional amendment establishing term limits. It declared the clause in the amendment relating to restrictions on pensions for incumbent legislators to be unconstitutional but held it to be severable and upheld the balance of the amendment fixing term limits.

A reading of Sections 1, 2, and 3 of Amendment 73 shows that they are grammatically independent and functionally independent. The question then remains whether the Arkansas voters would have adopted Sections 1 and 2 relating to State officeholders and legislators in the absence of Section 3 which applies to U.S. senators and representatives. We believe that the circuit court was correct in concluding that what the people voted for in adopting Amendment 73 was a theme or concept—the limitation of service terms for persons in public office. The fact that one category of persons is eliminated from that adopted Amendment does not mean that the voters did not intend it to apply to the remaining two categories. Nor do we consider term limits on federal legislators to be the bait which enticed voters to vote aye on the amendment as a whole. There is nothing to suggest that this was the case. In short, we are confident that Amendment 73 would have passed even without the inclusion of Section 3 in that the majority was voting for a concept—the limitation of public service terms.

We further disagree that *Hasha v. City of Fayetteville, supra*, controls this case. In *Hasha*, the issue was the placement of an invalid proposal for \$10 million in public school bonds on the same ballot with a proposal for a 20-year one percent sales and use tax to secure capital improvement bonds, including the school bonds. We held that the two proposals were inextricably linked, and we stated:

A voter who wished to vote for the issuance of the \$10,000,000 in bonds for the school district knew that he or she was required to also vote in favor of the tax because, without the tax, the bonds could not be issued. It is abundantly clear that the proposal for the issuance of the bonds for the construction of the school facilities was popular with the voters.

311 Ark. at 469, 845 S.W.2d at 505.

That is not the situation with Amendment 73. The common theme of term limitations applies equally to all three categories of elected officeholders. In *Hasha*, the public school bonds were categorically different from the sales and use tax and from the other capital improvements. The school bonds provided an obvious lure to assure a favorable vote on the tax proposal. Here, there is nothing before us to indicate that the voting public sought to limit one category of elected officials more so than another.

The remaining sections of Amendment 73 can stand independently without the presence of Section 3. There is nothing to suggest that the voters intended Sections 1, 2, and 3 to be dependent on one another so that if one section failed, the other sections failed also. The balance of Amendment 73 is valid.

V. STATE OFFICEHOLDERS

We next examine the constitutionality of Sections 1 and 2 of Amendment 73 relating to term limits on State executive and legislative officeholders. The circuit court,

though it invalidated the entire amendment for lack of an Enacting Clause, ruled that Sections 1 and 2 do not violate the First and Fourteenth Amendments to the U.S. Constitution.

We concur with this ruling. Individual States have limited the terms of their officeholders for decades, albeit more in the context of their governors than their legislators. See *Miyazawa v. City of Cincinnati*, 825 F. Supp. 816, 821 (S.D. Ohio 1993). In the case before us, the policy and interest of the State of Arkansas was expressed in the Preamble to Amendment 73:

The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of elected officials.

In counterpoint to the State's interest, as expressed by the adoption of Amendment 73, are the interests of current State officeholders and their supporters such as appellee Hill. We have already referred in this opinion to these legitimate interests in the political process which are protected under the First and Fourteenth Amendments.

The United States Supreme Court has made it clear that the right to candidacy is not a fundamental right requiring close scrutiny. *Bullock v. Carter*, 405 U.S. 134 (1972); see also *Clements v. Fashing*, 457 U.S. 957 (1982) (plurality decision). A second question, though, is whether the right of a person such as appellee Hill to participate in a person's political campaign or to vote for a candidate is fundamental in nature so as to warrant a *compelling* state interest to offset it. Separating the

rights of the candidate from those of the supporter may be difficult. The Court observed in 1992 that "the rights of voters and the rights of candidates do not lend themselves to neat separation." *Burdick v. Takushi*, 112 S.Ct. 2059, 2065-2066 (1992), quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972).

In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Court weighed the speech and association interests of voters for and supporters of John Anderson, an independent candidate for president of the United States, against the State of Ohio's asserted interest in protecting political stability by setting an early filing deadline. The Court held that the supporters' interests unquestionably outweighed the State's regulatory interests. The proper standard for resolving the assessment of the State's interest and the burden on supporters has since been described "as a more flexible standard" dependent on the severity of the burden. *Burdick v. Takushi*, 112 S.Ct. 2059, 2063 (1992). However, not every burden on the right to vote is subject to strict scrutiny or requires a compelling state interest to justify it. *Id.*

The California Supreme Court, in the wake of the *Anderson* case, considered the effect of a constitutional amendment fixing term limits on elected state officials. *Legislature of the State of California v. Eu*, 816 P.2d 1309 (Cal. 1991), cert. denied, 112 S.Ct. 1292 (1992). That Court weighed the interests of the voters and supporters of certain candidates against the will of the electorate limiting incumbent terms and held that the amendment would prevail irrespective of whether a rational basis standard or a compelling state interest standard was employed. The Court stated:

In sum, it would be anomalous to hold that a statewide initiative measure aimed at "restor[ing] a free and democratic system of fair elections," and "encourag[ing] qualified candidates to seek public office" (Cal. Const., art. IV, § 1.5), is invalid as an

unwarranted infringement of the rights to vote and to seek public office. We conclude the legitimate and compelling interests set forth in the measure outweigh the narrower interests of petitioner legislators and the constituents who wish to perpetuate their incumbency.

816 P.2d at 1329.

It is not the function of this court to agree or disagree with the purpose and rationale behind Amendment 73. It is our function to determine whether the Amendment expresses such a legitimate and sufficient state interest that the rights of the supporters and the incumbents must yield. We hold that the state interest, as expressed in the Preamble to Amendment 73, is sufficiently rational and even compelling when weighed against the residual burden placed on the rights and privileges of elected officeholders and those desiring to support them.

VI. TERMS OF SERVICE COUNTED

Because we hold that Sections 1 and 2 of Amendment 73 are severable and valid, we must determine when the terms of service by State officeholders are counted for purposes of disqualification. Appellant Americans for Term Limits as well as appellees Hill and Herget contend as part of their justiciability arguments that Amendment 73 is retroactive in its effect and that terms of service prior to Amendment's effective date of January 1, 1993, should be counted for disqualification purposes. Other appellants, including the State of Arkansas and U.S. Term Limits, Inc., argue that only terms of service after the effective date of the Amendment are to be counted. The effect of counting terms of service after January 1, 1993, would be that State executive officers and senators would not be ineligible for another eight years (two four-year terms) and that State representatives would not be ineligible for another six years (three two-year terms). Conversely, by counting prior terms of service, any State

executive officer or senator having previously served two terms and any State representative having previously served three terms is disqualified.

In reviewing several of the term limitations amendments adopted in other States, we note where the amendments either provide a date certain from which terms will be counted or, alternatively, provide for ineligibility based on a fixed number of years served:

- State of Washington. Wash. Rev. Code § 29.15.240 (Supp. 1993) (no terms served before November 3, 1992, may be used to determine eligibility to appear on the ballot) (approved Nov. 3, 1992).
- State of California. Cal. Const. art. XX, § 7 (applies to terms of state constitutional officers and legislators where the official was elected or appointed to the office after November 6, 1990) (adopted Nov. 6, 1990).
- State of California. Cal. Elections Code § 25003 (Deering Supp. 1993) (terms of office in Congress prior to January 1, 1993, shall not be counted) (approved Nov. 3, 1992).
- State of Colorado. Colo. Const. art. XVIII, § 9a (applies to terms of office in Congress beginning on or after January 1, 1991) (approved Nov. 6, 1992).
- State of Wyoming. Wyo. Stat. §§ 22-5-103, 22-5-104 (1992) (terms of service in state offices and in Congress prior to January 1, 1993, shall not be counted) (approved Nov. 3, 1992).
- State of Florida. Fla. Const. art. 6, § 4 (no person may appear on ballot for state or federal office if by end of current term in office, the person will have served in that same office for eight consecutive years) (approved Nov. 3, 1992).

- State of North Dakota. N.D. Cent. Code § 16.1-01-13.1 (Supp. 1993) (person ineligible for Congress if by the start of the term for which election is being held that person has served at least twelve years) (approved Nov. 3, 1992).
- State of Oklahoma. Okla. Const. art 5, § 17A (member of Legislature elected after effective date of amendment eligible to serve 12 additional years) (approved Sept. 18, 1990).
- State of Ohio. Ohio Const. art. V, § 8 (terms beginning on or after January 1, 1993, shall be considered for eligibility to the U.S. Senate and House of Representatives) (approved Nov. 3, 1992).

Amendment 73 does not expressly provide a separate benchmark date after which terms of service will be counted.

To resolve the question of when to count terms, we turn to the measure itself. In doing so, we construe constitutional amendments liberally to accomplish their purposes. *Porter v. McCuen*, 310 Ark. 674, 839 S.W.2d 521 (1992). We will not give a strained construction contrary to the spirit and purpose of the amendment as expressed by the people. *Thompson v. Younts*, 282 Ark. 524, 669 S.W.2d 471 (1984). Amendment 73 contains an effective date and states that none of the State elected officials, whether executive or legislative, may serve more than the specified number of terms. It further proclaims that it is "applicable to all persons thereafter seeking election." However, it is simply not clear on when counting the terms must commence.

Constitutional amendments operate prospectively unless the language used or the purpose of the provision indicates otherwise. *Drennan v. Bennett*, 230 Ark. 330, 322 S.W.2d 585 (1959). We have also held that with respect to an amendatory act the legislation will not be con-

strued as retroactive when it may be reasonably construed otherwise. *Lucas v. Handcock*, 266 Ark. 142, 583 S.W.2d 491 (1979); see also *Gannett River States Publishing Co. v. Arkansas Indus. Dev. Comm'n*, 303 Ark. 684, 799 S.W.2d 543 (1990). The same rule of construction is equally applicable to a constitutional amendment. The Amendment in this case is vague and ambiguous on the point of when to begin counting terms. As already stated, two proponents of the Amendment, U.S. Term Limits, Inc. and the State of Arkansas represented by the Attorney General's office, interpret it to apply prospectively. Arkansans for Governmental Reform took the same position before the circuit court. Because of the vagueness in the Amendment on this point, we agree. Only periods of service commencing on or after January 1, 1993, will be counted as a term for limitation purposes under Amendment 73.

A mandate will issue in this case on March 14, 1994. Any petition for rehearing shall be filed no later than March 9, 1994. Any response shall be filed no later than March 11, 1994.

Special Justices Ernie Wright and Carl McSpadden join in this opinion.

Dudley and Hays, JJ., and Special Chief Justice George K. Cracraft and Special Justice Gerald P. Brown concur in part and dissent in part.

Holt, C.J., and Newbern, Glaze and Corbin, JJ., not participating.

CONCURRING IN PART AND DISSENTING IN PART.

ROBERT H. DUDLEY, Associate Justice

I concur in three of the holdings of the majority opinion, dissent from one, and do not reach the other two.

I.

I concur with the holding that this case presents a justiciable issue. The petitioners below sought a judgment declaring that Amendment 73 is invalid. We have said that a declaratory judgment is especially appropriate in disputes between private citizens and public officials about the meaning of the constitution or statutes. *Culp v. Scurlock*, 225 Ark. 749, 284 S.W.2d 851 (1955). If, as argued by intervenors, some state officeholders are illegally holding office, their salaries would constitute illegal exactions, and a declaratory judgment action is appropriate to determine that issue. *McDonald v. Bowen*, 250 Ark. 1049, 468 S.W.2d 765 (1971). Thus, there is a justiciable issue, and a suit for declaratory judgment is the proper action to determine the issue.

II.

I concur with the holding that Amendment 73, in part, violates the Constitution of the United States. It does so for three reasons. First, the framers rejected the idea of term limits in drafting the Constitution. Second, allowing a several state to create qualifications for national officeholders is antithetical to republican values. Third, the imposition of term limitations upon members of the Congress of the United States would violate the Qualifications Clause of the Constitution because it would add a qualification—lack of incumbency—to the requirements that are fixed by the Constitution, and the several states do not have this power. *See Plugge v. McCuen*, 310 Ark. 654, 661, 841 S.W.2d 139, 143 (1992) (Dudley, J., dissenting).

The third reason stated above is a close question and difficult issue. The articulate dissenting opinions of Justices Hays and Cracraft cause one to pause. The argument that a candidate is only barred from appearing on the ballot, but is not barred as a write-in candidate, is appealing at first blush, but when one thinks about it the issue becomes clear because, as a practical matter, the

amendment would place term limits on service in the Congress. I am reassured by the style of this case, U.S. Term Limits, Inc. That name implies just what this amendment is: A practical limit on the terms of the members of the Congress. The fact that a person can conceivably be elected as a write-in candidate does not vitiate the fact that, as a practical matter, write-in candidates are at a distinct disadvantage. The result would be that the Qualifications Clause would be violated by the amendment.

III.

I concur in the holding that the voters of this State can, by amendment of the state constitution, limit the terms of state officeholders. There is no violation of the First and Fourteenth Amendments to the Constitution of the United States because the state interest of limiting the terms of officeholders clearly outweighs the burden on the officeholders and those supporting them. *See Anderson v. Celebreeze [sic]*, 460 U.S. 780 (1983).

IV.

I dissent from the holding in the plurality opinion that the provision in the amendment for limiting the terms of federal officeholders can be severed from the provision limiting the terms of state officeholders. This is a state issue and is governed by state law.

Amendment 73 contains a severability clause, but that clause alone does not necessarily determine severability. In *Combs v. Glen Falls Insurance Co.*, 237 Ark. 745, 375 S.W.2d 809 (1964), we wrote:

A severability clause is frequently an aid to the Courts in the construction of a statute, but, in the oft-quoted words of Justice Brandeis, it is not "an inexorable command." *Dorchy v. Kansas*, 264 U.S. 286, 68 L. Ed. 686, 44 S. Ct. 323. *While such a clause deserves reasonable consideration it should not be paid undue homage.* Sutherland, Statutory

Construction (3d Ed.) § 2408. For example, if an act should levy a new tax and create a new agency for its collection, no one could doubt that the invalidation of the tax would also do away with the collection agency, despite the presence of a severability clause. In *Nixon v. Allen*, 150 Ark. 244, 234 S.W. 45, we declared an entire act to be invalid, in the face of such a clause, *because we concluded that if the legislature had known in advance that part of the act was unconstitutional it would not have enacted the rest. That is really the test.*

Id. at 747-48, 375 S.W.2d at 810-11 (emphasis added).

After writing the above, we declared the entire act void even though the act at issue contained a severability clause and only part of the act was invalid. We did so because the "alternatives are complementary and interdependent." *Id.* at 748, 375 S.W.2d at 811.

Somewhat like the case at bar, in *Allen v. Langston*, 216 Ark. 77, 224 S.W.2d 377 (1949), the citizens of Lee County passed an initiated motor vehicle tax act pursuant to Amendment 7, the initiative amendment. The initiated act authorized a tax on motor vehicles as well as wagons and buggies. A part of the tax was for the privilege of driving motor vehicles on the highways, and we held that the country's attempt to tax the use of the highways for motor vehicles was contrary to the general law of the state and therefore unconstitutional. However, that part of the act which taxed wagons and buggies was valid since state law had not preempted that field. In sum, part of the initiated act was valid and part of it was invalid. We held the entire initiated act void "for the reason that *it seemed apparent that the people of Lee County had no intention of separating and enforcing the provision as to wagons and buggies in the event the remaining tax on motor vehicles was declared void and of no effect.*" *Id.* at 85, 224 S.W.2d at 381 (emphasis added).

Likewise, in *Wenderoth v. City of Fort Smith*, 251 Ark. 342, 472 S.W.2d 74 (1971), we said that when parts of a law are connected and interwoven, and the legislature intended to enact the law as a whole and not in parts, severance is not appropriate.

In *Hasha v. City of Fayetteville*, 311 Ark. 460, 845 S.W.2d 500 (1993), the City placed a sales and use tax proposal on the same ballot as an invalid proposal to construct school facilities. The invalid proposal to construct school facilities was a lure to obtain a favorable vote on the tax. We held severance was not appropriate because the two proposals were "inextricably linked" and "tied together." We wrote: "There was a natural relationship between them. The two proposals were part of the same plan. They were united." *Id.* at 470, 845 S.W.2d at 505. Also, the bonds were "a primary purpose of the tax." *Id.*, 845 S.W.2d at 506. Both the dissenting opinion and the dissenting opinion on rehearing make clear the fact that no evidence was submitted to support the holding that the voters were lured into voting for the tax. See 311 Ark. 460, 471, 845 S.W.2d 500, 506 (Glaze, J., dissenting); *Hasha v. City of Fayetteville*, 311 Ark. 476-A, 476-C, 847 S.W.2d 41, 42 (1993) (supplemental opinion denying rehearing) (Glaze, J., dissenting). The pertinent questions are whether there the two proposals were inextricably linked in the minds of the voters, whether they were tied together in the minds of the voters, whether the voters perceived a natural relationship between them, whether they were presented as being united, whether the voters had any intention of separating the proposals and enforcing them separately, and whether both were a primary purpose of the amendment. To state the questions is to answer them. The two proposals were clearly tied together. They were linked. There was a natural relationship between them. Limiting the terms of members of Congress was a primary purpose of the amendment. *Both proposals were sold together as one political package.*

Each ballot cast at the election contained a ballot title, or summary, of the amendment. The great majority of voters derived their information about the amendment from the ballot title. *Dust v. Riviere*, 277 Ark. 1, 638 S.W.2d 663 (1982). The ballot title that the voters read in voting on this amendment was as follows:

An Amendment to the Constitution of the State of Arkansas limiting the number of terms that may be served by the elected officials of the Executive Department of this state to two (2) four year terms, this department to consist of a Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, Commissioner of State Lands; limiting the number of terms that may be served by members of the Arkansas Senate to two (2) four-year terms, these members to be chosen every four years; providing that any person having been elected to three (3) or more terms as a member of the United States House of Representatives from Arkansas shall not be eligible to appear on the ballot for election to the United States House of Representatives from Arkansas; providing that any person having been elected to two (2) or more terms as a member for the United States Senate from Arkansas shall not be eligible to appear on the ballot for election to the United States Senate from Arkansas; providing for an effective date of January 1, 1993; and making the provisions applicable to all persons thereafter seeking election to the specified offices. [Sic.]

Before the vote on the amendment was held, the proponents of the measure were aware of the problems involved in linking the two measures. In declining to remove the proposal from the ballot before the election this court wrote:

Undoubtedly, a strong case can be made concerning the Term Limitation Amendment's invalidity both under Arkansas's and the United States' Constitutions,

and voters should be aware that their votes for or against this measure may ultimately have value only as an expression of public sentiment on the subject. In short, a future judicial proceeding will be required to decide the Amendment's validity if it is adopted by the people. If that occurs, the constitutional arguments posited here will then be placed squarely before us and can be decided after due and proper consideration.

Plugge v. McCuen, 310 Ark. 654, 661, 841 S.W.2d 139, 143 (1992) (emphasis added).

Undisputedly, the two proposals were packaged and sold together. One of the proposals is valid, while the other is unconstitutional. The proponents of the amendment were aware of the pending constitutional issue, but they objected to it being decided before the election. Still, they continued to sell the proposals together. The majority opinion severs the two proposals *after the election* and declares one of them valid.

The precedent set by the majority opinion runs counter to the efforts of this court to require fairness and honesty in the presentation of initiated proposals to the voters. We have required that ballot titles be honest and impartial. *Dust v. Riviere*, 277 Ark. 1, 638 S.W.2d 846 (1984); *Shepherd v. McDonald*, 189 Ark. 815, 131 S.W.2d 635 (1939). We have mandated that ballot titles fairly assess the general purpose of the act. *Coleman v. Sherrill*, 189 Ark. 843, 75 S.W.2d 248 (1934). We have held they must not be misleading. *Westbrook v. McDonald*, 184 Ark. 740, 43 S.W.2d 356 (1931).

The troubling aspect of the precedent set by the case at bar is illustrated by the case of *Hoban v. Hall*, 229 Ark. 416, 316 S.W.2d 185 (1958). In that case we ordered a proposal removed from the ballot before the people voted on it, and, to that extent it is not applicable, but it is applicable to demonstrate how some people will attempt

to bait a proposed amendment. The proponents of the initiated amendment named their proposal "The States' Rights Amendment" since that was a popular concept in the South at the time. However, the ballot title failed to disclose that the amendment would create a commission with overreaching authority. It could conduct investigations and conduct public or secret hearings and "interrogate any citizen in the state about his business affairs, his private life, his political beliefs, or any other subject that can be imagined." *Id.* at 420, 316 S.W.2d at 187. If a public official failed to carry out "the clear mandates" of the amendment, he was subject to a fine, imprisonment, and automatic forfeiture of office. *Id.* In removing the proposal from the ballot because the proponents only disclosed the bait of states' rights, we wrote:

The cause of states' rights, like that of the aged and the blind, is deservedly a popular one and undeniably appeals to the great body of the electorate. But are there provisions in the amendment which, if made known, would give the voter serious ground for reflection?

Id. at 418, 316 S.W.2d at 187. We did not allow the misleading political packaging.

The majority opinion does not fully address political packaging and the questionable precedent. Rather, it misses the mark and concentrates on whether the two proposals can be said to literally stand independently.

In summary, I concur in holding that the part of Amendment 73 which is in violation of the Constitution of the United States is void, and that part which limits the terms of state officeholders is valid. I would hold that in the minds of the voters the invalid part of the amendment was inextricably linked with the valid part, and, as a result, I would not allow the two proposals to be severed after the election. Consequently, I would hold that Amendment 73 is void.

V.

Since I would hold that Amendment 73 is void for the reasons set out above, I do not reach the issues regarding the enacting clause and terms of service counted.

CONCURRING IN PART; DISSENTING IN PART.

STEELE HAYS, Associate Justice.

Although I agree with today's decision upholding term limits upon state officeholders and severing that part of Amendment 73, I disagree with the holding of the majority that the eligibility restriction upon United States senators and representatives is unconstitutional. I start from the premise that all political authority resides in the people, limited only by those provisions of the federal or state constitutions specifically to the contrary. In this instance the people of Arkansas have spoken, prudently or otherwise, in the most direct means available to them—an initiated amendment to their state constitution. That expression should not be denied them except on clear and compelling grounds. Such grounds have not been demonstrated to my satisfaction.

The people of each state possess all powers which are not expressly or impliedly delegated to the federal government or which they are not prohibited from exercising by the United States Constitution. U.S. Const. amend. 10. *See State v. Nichols*, 26 Ark. (1870). Further, we must presume the amendment is constitutional, and all doubts must be resolved in favor of its constitutionality if it is possible to do so. *Fayetteville School Dist. v. Arkansas State Bd. of Education*, 313 Ark. 1, 825 S.W.2d 122 (1993); *Gazaway v. Greene County Equalization Board*, 314 Ark. 569, 864 S.W.2d 233 (1993). Accordingly, if a provision of the amendment is not clearly prohibited, we are obliged to construe it as constitutional.

I find the United States Constitution does not prohibit additional qualifications for senators and representatives.

The Qualification Clauses of Article 1 of the Constitution simply provide: "No person shall be a representative [senator] *who shall not have . . .*" (Emphasis supplied.) This language indicates the qualifications are to be the *minimum* requirements rather than the *exclusive* requirements. I see it as significant that the Constitution provides: "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." Art 1, § 2, cl. 1. This provision contemplates allowing a state to require an elector to have attained the age of thirty years.¹ It seems clear the framers intended to prevent a person under the age of twenty-five years from being elected to the House of Representatives, but, if a state required electors to be at least thirty years of age, it is implausible to conclude the state would be required to allow a person to run for office who could not vote. Since the framers determined that the people of each state could establish requirements for their electors, it stands to reason that the qualifications in Article 1 are minimum requirements. In sum, the framers intended merely to insure that no state lowered the standards for being elected to the House of Representatives or Senate.

The majority states that the history surrounding the drafting of the Constitution is inconclusive, yet they rely upon that history as discussed in *Powell v. McCormack*, 395 U.S. 486 (1969). In *Powell*, the Court held the House of Representatives could not exclude Congressman Powell, a duly elected member of Congress, for any reason other than the qualifications set forth in the Constitution. In so holding, the Court examined the debates surrounding the drafting and ratification of the Constitution itself. While it is clear that the framers discussed term

¹ I recognize that Amendment 26 of the United States Constitution prohibits such an action; however, the actions of the framers must be examined within the proper context. At the time the Constitution was ratified, a state could abridge the right to vote by establishing a property requirement or an age restriction beyond 18 years of age.

limits, I am not convinced that the failure to include term limits in the Constitution prohibits the people of the states from enacting term limits.

The only "intent" that can be ascertained from the framers' exclusion of term limits is that the delegates considered it undesirable to impose a uniform tenure limitation upon the representatives of every state. However, this does not confirm that the people of each state are prohibited from enacting term limits. Even the majority recognizes that whether the States are foreclosed from adding a restriction to candidacy is not specifically addressed in the Constitution or the historical debates. Nevertheless, the majority places emphasis upon the historical debates and Alexander Hamilton's "allusion to the fixed and immutable character of the enumerated qualifications."

Justice Holmes observed that government is an experiment. The people are the conductors of that endless experiment and have the right to tinker with it as they choose, free of unwarranted interference. Although it may make "eminently good sense" to have uniform qualifications for federal legislators in order to prevent an "imbalance among the states," I submit the drafters of the Constitution intended merely to establish uniform minimum qualifications.

Nor can I agree that the effective date of the amendment for purposes of compliance is other than January 1, 1993, the date specified in the provision. The avowed purpose of Amendment 73 is to revitalize government, inhibit voter apathy and stimulate voter participation and involvement. I can find no basis for concluding that the electorate intended to defer those objectives for an additional six years.

Amendment 73 contains an effective date and states that none of the State elected officials, whether executive or legislative, may serve more than the specified number of terms. It further proclaims that it is "applicable to all persons thereafter seeking election." The Ballot Title

contained the same quoted language. The purpose of the amendment, as stated in its Preamble, is to limit the terms of elected officials who are described as an entrenched incumbency who ignore their duties and are preoccupied with reelection. The language of the amendment itself read as a whole runs counter to an interpretation that it is not to take effect, practically speaking, until 2000 or thereafter.

I do not believe that Amendment 73 is a retroactive law because the amendment does not take away a vested right or impose a new obligation, duty, or disability regarding matters that already have occurred. *F.D.I.C. v. Faulkner*, 991 F.2d 262 (5th Cir. 1993), citing *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (1988); *Miyazawa v. City of Cincinnati*, 825 F.Supp. 816 (S.D. Ohio 1993); *Ficaria v. Dept. of Reg. Agencies*, 849 P.2d 6 (Colo. 1993). A statute does not operate retroactively merely because its application requires some reference to prior facts. *F.D.I.C. v. Faulkner*, *supra*, citing *McAndrews v. Fleet Bank of Massachusetts*, 989 F.2d 13 (1st Cir. [sic] 1993) [citing *Cox v. Hart*, 260 U.S. 427 (1922)]. Furthermore, it is clear that holding public office is a privilege, not a vested right. *Miyazawa v. City of Cincinnati*, *supra*.

For the reasons stated, I concur in the majority opinion as to Section I (JUSTICIABILITY), Section II (ENACTING CLAUSE), Section IV (SEVERABILITY), and Section V (STATE OFFICEHOLDERS), but not as to Sections III (QUALIFICATIONS CLAUSE), and Section VI (TERMS OF SERVICE COUNTED), to which I respectfully dissent.

CONCURRING IN PART; DISSENTING IN PART.

GEORGE K. CRACRAFT, Special Chief Justice

I concur with the results reached in the majority opinion on the issues of justiciability, the enacting clause, the constitutionality of limitations on state elected officials, severa-

bility, and terms of service to be counted. I cannot, however, agree that the restrictions on members of the United States Congress violate the Qualifications Clauses of Article I, Sections 2 and 3 of the United States Constitution. I do not view the provisions of Amendment 73 to the Arkansas Constitution as raising a "qualifications" issue, but rather a ballot access issue to be measured by the First and Fourteenth Amendments to the United States Constitution.

Unlike Sections 1 and 2 of Amendment 73 (which apply to state elected officials), Section 3 (which applies to members of Congress) does not impose an absolute bar on incumbent succession. Instead, Section 3 merely makes it more difficult for an incumbent to be elected. Under our liberal write-in laws, an incumbent can be elected to congressional office and, if elected, serve the term for which elected. An incumbent United States Representative or Senator can also serve in the Congress under appointment to fulfill an unexpired term. In neither case would his or her qualifications to serve be in anywise affected by Amendment 73. In my view, a person is qualified within the meaning of Article I of the United States Constitution if permitted to serve if elected. While an incumbent congressional candidate's ballot access is limited, his or her qualifications to serve if elected to Congress are not affected.

The United States Supreme Court has never squarely faced this issue. However, two United States Courts of Appeals have recognized the distinction I would make between ballot access restrictions and those qualifications mentioned in Article I, and I find their decisions persuasive. See *Hopfmann v. Connolly*, 746 F.2d 97 (1st Cir. 1984), *vacated in part on other grounds*, 471 U.S. 459 (1985), and *Joyner v. Mofford*, 706 F.2d 1523 (9th Cir. 1983). In *Hopfmann*, the court stated:

Plaintiffs next argue that the application of the 15 per cent rule [restricting which candidates' names

would appear on the Democratic primary ballot to those who received at least 15 percent of the vote at the party's convention] transgresses Article I, Section 3, Clause 3 of the Constitution in that it unlawfully adds a qualification for the office of United States Senator beyond the age, citizenship and residency requirements of the Constitution.

As the defendants have correctly pointed out, the 15 percent rule does not add a qualification that precludes Hopfmann from obtaining the office of United States Senator. The rule merely adds a restriction on who may run in the Democratic party primary for statewide political office and potentially become the party nominee. The cases cited by plaintiffs to the effect that neither Congress nor the states can add to the constitutional qualifications for office are inapposite. *Cf. Powell v. McCormack*, 395 U.S. 486, 547, 551, 89 S. Ct. 1944, 1977, 1979, 23 L.Ed.2d 491 (1969).

Unlike the additional requirements involved in the cases cited by plaintiffs, failure to comply with the 15 percent rule does not render a candidate ineligible for the office of United States Senator. An individual is free to run as the candidate of another party, as an independent, or as a write-in candidate. If he is elected and meets the requirements of Article I, Section 3, he will be qualified to take office. As the Wyoming Supreme Court stated in *State v. Crane*, 197 P.2d 864, 871 (Wyo. 1948), *the test to determine whether or not the "restriction" amounts to a "qualification" within the meaning of Article I, Section 3, is whether the candidate "could be elected if his name were written in by a sufficient number of electors."*

746 F.2d at 102-03 (emphasis added).

In my view, the Qualifications Clauses protect only the right of a person who meets the qualifications of age,

citizenship, and residency to be seated in the Congress if elected. They do not address the right of any person to seek election or that of his constituents to vote for the person of their choice. Indeed, the Qualifications Clauses themselves begin with the phrase "[n]o person shall be" a representative or senator, a choice of words that, to my mind, clearly demonstrates that the Qualifications Clauses are addressed to service in the Congress. The rights to seek election and to vote for the candidates of one's choice are afforded the protection of the First and Fourteenth Amendments against ballot access restrictions that are too severe when measured by the balancing test set out in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, — U.S. —, 112 S.Ct. 2059 (1992). Nor should the odds for or against the successful waging of a write-in campaign lead to the conclusion that Section 3 of Amendment 73 is a "qualification" in "ballot access clothes." Rather, such odds should be merely one factor considered along with all others in the balancing process which pits candidates' and voters' rights against the state's interest in fair and open elections, free of perceived evils of entrenched incumbency.

In our deliberations, we have applied that balancing test to Sections 1 and 2 of Amendment 73 and found that the state's interest in preventing the perceived evils outweighs the First and Fourteenth Amendment rights of state level candidates and voters therefor. In my opinion, since we have decided that Amendment 73's lifetime bar on state level incumbents passes Fourteenth Amendment muster, it must necessarily follow that the less stringent restriction placed on members of Congress easily pass this same test.

I would hold that Amendment 73 to the Arkansas Constitution was proposed and adopted in the manner provided by law, is not constitutionally infirm in any respect, and is valid and enforceable in its entirety.

CONCURRING IN PART; DISSENTING IN PART.

GERALD P. BROWN, SPECIAL JUSTICE

The enactment clause issue, which has assumed a curious prominence in this drama, is in reality a petition-sufficiency issue over which this court has original and exclusive jurisdiction. Ark. Const. amend. 7. Since the trial court based its ruling on that issue, we would ordinarily dispose of it on procedural grounds. Under the circumstances of this case, I do not believe that such a disposition would be in the public interest in as much as the enactment clause issue (along with several others) was raised in this court in pre-election challenge. We declined to decide this issue at that time for the reasons set forth in *Plugge v. McCuen*, 310 Ark. 654, 841 S.W.2d 139 (1992). I agree with the majority's decision to address the enactment clause issue at this time and dispose of it on its merits.

I also agree with the majority opinion that Amendment 73 is not vulnerable to attack on the enactment clause ground. In the first place, I do not believe that Amendment 7 requires a constitutional amendment to contain an enactment clause. Even if it does, Amendment 73 substantially complies.

The initiative petition, which placed Amendment 73 on the ballot, begins, "We, the undersigned legal voters of the State of Arkansas, respectfully propose the following Amendment to the Constitution of the State of Arkansas . . ." and ends, "and by this, our petition order that the same be submitted to the people of said state, to the end that the same may be adopted, enacted, or rejected by the vote of legal voters of said state. . . ." (Emphasis supplied.) That does not leave much room for doubt that the voters knew that they were enacting a new law. No one has suggested that the absence of the words "Be it Enacted" misled anyone or had any effect on the outcome of the election. To strike down Amendment 73 for want

of a formal enactment clause, after it has been approved by sixty percent of the voters, would be unduly technical and would elevate form over substance.

I agree with the majority opinion which holds that section 3 of Amendment 73 is fatally flawed because it conflicts with Supremacy Clause and the Qualification Clauses of the United States Constitution.

Although the issue is not entirely free from doubt, I believe the founding fathers considered and rejected term limits for members of Congress at the time of the adoption of the United States Constitution by the Constitutional Convention in Philadelphia over two hundred years ago. [See authorities discussed in majority opinion and the dissenting opinion in *Plugge v. McCuen*, 310 Ark. 654, 841 S.W.2d 139 (1992).]

As the majority opinion recognizes, and Justice Hays forcefully argues in his dissenting opinion, whether the founding fathers intended to foreclose the states from imposing additional qualifications for Congressmen was not definitively and categorically settled. In fact, Justice Hays makes a strong case for "minimum" rather than "exclusive" qualifications. But the action finally taken by the framers of the constitution, following exhaustive debates, is strong evidence that term limits for senators and representatives was rejected. Certainly that is the most plausible interpretation; and the specter of the hodgepodge of qualifications which a contrary holding might engender is daunting enough to swing the balance.

Congressional officeholders partake of the same national character as the President of the United States. Members of Congress pass laws which affect not only their own state, but all the states. They are part of the national team which was created by the Continental Congress. The rules which govern their qualifications are contained in the Constitution of the United States. Uniformity of qualifications is paramount, and individual states are

not free to engraft variations. The terms for members of Congress can be limited only by amending the United States Constitution.

Does the constitutional infirmity of section 3 vitiate the entire amendment, or is the serum provided by the severability clause strong enough to prevent the spread of the infection?

In *Combs v. Glenn Falls Ins. Co.*, 237 Ark. 745, 375 S.W.2d 809 (1964), this court held that the test of the efficacy of a severability clause is whether the measure would have passed without the unconstitutional portion.

There is no way for this court to determine whether the voters would have approved term limits for state officeholders if section 3 had not been in the picture. The sponsors of Amendment 73 created this uncertainty and, therefore, had the onus to furnish this court something to go on besides speculation. There is nothing in the record to show that this dichotomous issue was explained to the voters in a meaningful way. In short, there was not a straightforward, up-or-down vote on term limits for state officeholders.

There can be no serious doubt that a state has plenary power to impose term limits on state officials, provided it is accomplished in a constitutionally permissible manner. The sponsors of Amendment 73 obviously knew that section 3 was of questionable constitutionality because of the different approach they used: ballot access. They knew that most of the public discussion of term limits had been in the context of congressional officeholders. When they chose to blanket the two groups (state and federal officeholders) into one unified package, the voters had no choice to approve one without the other. The two groups were not only inextricably linked—they were systemically fused in such a manner that each ceased to have a separate existence for voting purposes. Although section 3 is couched in ballot-access terminology, the distinction be-

tween outright bar and ballot-access is too fine a point for the average voter to grasp.

The practice of coupling a legitimate objective with one of doubtful legality, papered over with a severability clause, is not fair to voters. It is misleading at the very least, if not downright deceptive, and should be discouraged. We should make it clear to sponsors of constitutional amendments and initiated acts that they are skating on thin ice when they rely on the redemptive power of a severability clause to bail out a shaky joinder. Such a posture will promote truth-in-packaging and thus be voter-friendly.

While "The States' Rights Amendment" involved in *Hoban v. Hall*, 229 Ark. 416, 316 S.W.2d 185 (1958), discussed at length in Justice Dudley's dissent herein, is admittedly an extreme example, it is illustrative of an effort to couple a legitimate public concern with a less laudable objective, with potential far-reaching consequences. The court simply ignored the severability clause in *Hoban* and treated it as a ballot title issue rather than a severability clause issue. Of course, those are separate issues, but they have in common the potential for unfairness to voters.

Sections 1, 2 and 3 of Amendment 73 were presented to the voters as an "all or nothing" package. State and federal officials were lumped together and referred to in the Preamble as "elected officials." Section 6 stated that the provisions of Amendment 73 shall be applicable to "the offices specified in this Amendment." The offices specified are state and federal officeholders.

Since section 3 cannot pass constitutional muster, sections 1 and 2 must also fall.

I respectfully dissent from the majority holding that the severability clause saved sections 1 and 2.

APPENDIX B

ARKANSAS SUPREME COURT

PROCEEDINGS OF MARCH 14, 1994

PER CURIAM ORDERS

REHEARING DENIED: Petitions for rehearing are denied today in the following cases.

* * *

93-1240. U. S. Term Limits, Inc., et al. v. Bobbie E. Hill, et al., from Pulaski Circuit. Petition of State of Arkansas *ex rel.* Attorney General Winston Bryant. Special Chief Justice George K. Cracraft and Special Justices Ernie Wright and Gerald Brown join. Special Justice Carl McSpadden would grant. Holt, C.J., and Newbern, Glaze, and Corbin, JJ., not participating.

93-1240. U. S. Term Limits, Inc., et al. v. Bobbie E. Hill, et al., from Pulaski Circuit. Petition of U. S. Term Limits, Inc., et al. Special Chief Justice George K. Cracraft and Special Justices Ernie Wright, Gerald Brown, and Carl McSpadden join. Hays, J., would grant. Holt, C.J., and Newbern, Glaze, and Corbin, JJ., not participating.

93-1240. U. S. Term Limits, Inc., et al. v. Bobbie E. Hill, et al., from Pulaski Circuit. Petition of Senatorial Unified Members. Special Chief Justice George K. Cracraft and Special Justices Ernie Wright and Gerald Brown join. Special Justice Carl McSpadden would grant. Holt, C.J., and Newbern, Glaze, and Corbin, JJ., not participating.

* * *

APPENDIX C

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

No. 92-6171

BOBBIE E. HILL, Individually, And On Behalf of THE
LEAGUE OF WOMEN VOTERS OF ARKANSAS And All
Others Similarly Situated, and DICK HERGET, Individu-
ally And On Behalf of All Others Similarly Situated,
Plaintiffs

vs.

JIM GUY TUCKER, Governor of the State
of ARKANSAS; *et al.*,

Defendants

STATE OF ARKANSAS EX. REL. ATTORNEY GENERAL
WINSTON BRYANT,

Intervenor/Defendant

ARKANSAS [*sic*] FOR GOVERNMENTAL REFORM, *et al.*,
Intervenor/Defendant

AMERICANS FOR TERM LIMITS, *et al.*,
Intervenor/Defendant

U.S. TERM LIMITS, INC., *et al.*,
Intervenor/Defendant

CONCLUSIONS OF LAW

This case involves a justiciable controversy. The plain-
tiffs have a constitutional right of association which would
be impaired if they were required to wait until filing dead-
line to prepare the political machinery necessary to place

an incumbent affected by this initiative on the primary ballot. See *Anderson v. Celebreeze* [sic], Jr., 460 U.S. 780, 103 S. Ct. 1564, (1983). The political parties and the Secretary of State are governed by the term limit amendment and are adverse to the Plaintiffs and incumbents. The controversy in this case is ripe for judicial determination. *Andres v. First Arkansas Development Finance Corp.*, 230 Ark. 594, 324 S.W. 2d 97 (1959). The California Supreme Court when considering a term limit initiative exercised original jurisdiction rather than requiring initial disposition by a lower court because the "issues are of great public importance and should be resolved promptly." *Legislature of the State of California, et al v. March Fong EU, as Secretary of State*, 816 p. 2d [sic] 1309 (1991) at p. 1312.

The Arkansas Term Limitation Amendment contains a glaring and fundamental error. Amendment 7 of the Constitution of Arkansas reserves to the people the power to amend the state constitution through initiative petition. This amendment requires an enacting clause. The requirement was held to be mandatory in *Hailey v. Carter*, 221 Ark. 20, 251 S.W. 2d 826 (1952), where the Arkansas Supreme Court held that a proposed initiated petition in Carroll County was fatally defective.

In *Vinsant v. Knox*, 27 Ark. 266 (1871) the Supreme Court discussed the history and importance of the enacting clause in legislative acts.

Likewise, we regard it as necessary that every act, thus expressed, should show on its face the authority by which it was enacted and promulgated, in order that it should clearly appear, upon simple inspection of the written law, that it was intended by the legislative power which enacted it, that it should take effect as law. . . . These are the features by which courts of justice and the people are to judge of its authenticity and validity. These, then are essentials of the weightiest importance, and the requirements of their

observance, in the enacting and promulgation of laws, are absolutely imperative. Not the least important of these essentials is the style or enacting clause. So the framers of the Constitution must have regarded it, or they would not so positively required it in the fundamental law of the land. *ibid.* p. 285.

Vinsant discussed the legal and historical backdrop of the enacting requirement that was included by the people in Amendment Number 7, and held as a mandatory requirement in *Hailey*, *supra*. The Arkansas term limit amendment contains no such clause, and this Court is bound by the Arkansas Constitution and the doctrine of *stare decisis* to hold that it is fatally defective.

Section 3 of the Arkansas Term Limitations Amendment reads:

(a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name place [sic] on the ballot for election to the United States House of Representatives from Arkansas.

(b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas."

A similar initiative was proposed in Nevada and rejected as being unconstitutional in that the "initiative clearly and palpably violates the qualifications clause of Article I of the United States Constitution." *Stumpf v. Lau*, 839 P. 2d 120 (1992) p. 122

The framers of the constitution debated the issue of term limits opting instead for frequent elections. The Federalist No. 53. Through a review of their delibera-

tions, it was evident that they were sensitive to the view that the wealthy might control congress.

The truth is that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect, or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the times, the places, and the manner of elections.

The qualifications of the persons who may choose or be chosen, as has been remarked upon another occasion, *are defined and fixed in the constitution; and are unalterable by the legislature. The Federalist No. 60, p.408.

Article I Section 2,[2] of the United States Constitution, states: "No person shall be a representative who shall not have attained to the age of twenty-five years, and has [*sic*] been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen."

The United States Supreme Court in *Powell v. McCormack*, 795 [*sic*] U.S. 486, 89 S.Ct. 1944 (1969) considered this clause in relation to the standing qualifications prescribed in the Constitution and narrowed the scope of Congress' power to exclude members-elect. "A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them.'" *Id.* p. 1977

Certainly the power to amend qualifications rests with the people, not with individual states.

Those officers owe their existence and functions to the united voice of the whole, not of a portion of the people. Further, as Justice Storey [*sic*] had observed, 'the States can exercise no powers whatsoever which exclusively spring out of the existence of the national government . . .' Thus, the initiative petition, whether

it enacts law or amends the state constitution, can have no effect on the terms of members of the United States Congress. (Citation omitted) *Stumpf*, *supra* p. 123.

This amendment is purely and simply a restriction on the qualifications of a person seeking federal congressional office. It is as much a qualification as wealth, position or poverty. This is a power given by the whole body politic to the Constitution which cannot be usurped by individual actions of the several states.

This Court holds that the term limitations found in this amendment imposed on the federally elected officials are unconstitutional in reliance on the qualifications clause of the United States Constitution and the doctrine of federal supremacy.

The Arkansas term limits amendment also limits the terms of state legislators and the executive branch of state government.

The first power reserved by the people by Amendment 7 of the Constitution of Arkansas is the initiative. In *State v. Donaghey*, 106 Ark. 56, 61 (1912) the Arkansas Supreme Court said:

[t]he people are the source of all political power, and it has never been doubted that according to the institutions of this country the sovereignty of every state resides in the people of the State, and they can alter or change their form of government at their own pleasure. Whether they have done so, is a question to be settled by the political power, and when that power has decided, the judiciary can but follow and sustain its action.

But whether an amendment to the State Constitution has been adopted in accordance with its requirements is a question for judicial determination.

There is little argument that the people of this State have the power to limit the terms of the state legislature

and executive branch. The main question is whether it conflicts with plaintiffs' constitutional rights of association as protected by the First and Fourteenth amendments as per *Anderson v. Celebrezze, Jr.*, supra. In *Anderson*, the court struck down a state law requiring an early filing for an independent candidate. The court balanced the state's interest in political stability, voter education and equal treatment against the voters' freedom of association and ballot access.

California considered and rejected this argument in *Legislature of the State of California v. EU*, supra, and the Court said,

The legitimacy of the foregoing asserted state interests in limiting incumbency are well recognized in analogous contexts. As stated by the West Virginia Supreme Court of Appeals in rejecting a similar challenge to a state constitutional amendment limiting the right of the Governor to seek a third consecutive term, 'Constitutional restrictions circumscribing the ability of incumbents to succeed themselves appear in over twenty state constitutions, and exist in the Twenty-second Amendment to the Constitution of the United States with regard to the Presidency. The universal authority is that restriction upon the succession of incumbents serves a rational public policy and that, while restrictions may deny qualified men an opportunity to serve as a general rule the over-all health of the body politic is enhanced by limitations on continuous tenure. *EU* at 1326.

The preamble to the Arkansas Term Limitation Amendment reads:

The people of Arkansas find and declare that elected officials who remain in office too long become pre-occupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive,

and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of elected officials.

The plaintiffs have the right to associate with and vote for any qualified candidate. The incumbency qualification is similar to age or residential requirement and the state's interest outweighs the assorted rights per *Anderson*, supra.

The power to limit terms of the state legislative and executive officers vests with the people through a properly drafted initiative.

An issue not easily decided is whether joining the unconstitutional attempt to add qualifications to United States representatives and senators with the term limits on state officers renders the entire initiative invalid because the sections are "inextricably linked." Our state court has considered this rule of law in several contexts. In *Nixon v. Allen*, 150 Ark. 244, (1921), the state legislature attempted to revamp the Pulaski County government by, among other things, creating two county judges which violated the state constitution. The Court said:

and, if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them.

In *Faubus, Governor v. Kinney*, 239 Ark. 443 (1965), the Arkansas Supreme Court considered the validity of Amendment 45 after the federal court invalidated the apportionment section. The court held that the people would have passed the amendment's section establishing the number of legislators regardless of the federal courts' decision.

Our current Supreme Court made the same inquiry in a split decision in *Hasha v. The City of Fayetteville*, 311 Ark. 460 (1993), where Justice Robert Dudley writing for the majority invalidated a vote on a city sales and use tax that was "inextricably linked" to the vote to issue bonds to construct school facilities. The two issues were joined on the ballot and separated by a line. The court held that the proposal for the school construction was popular, but the people who were less inclined to vote for the tax knew that the tax was essential for the construction.

Section 3, of the term limit amendment which is the constitutionally invalid provision is linked to state term limits on [*sic*] only in theme, a theme that the voters overwhelmingly approved by initiative. To hold that the provisions are "inextricably linked" per the analysis in *Hasha* this Court would have to conclude that the voters dislike for the federal delegation was overwhelming to the extent that they forced term limits upon state officials, an analysis that this Court cannot make.

In conclusion, this Court holds this initiative pertaining to the state officials invalid for failing to comply with the requirement of Amendment 7 of the Arkansas Constitution requiring an enacting clause. Moreover, the initiative pertaining to the federally elected officials is unconstitutional by virtue of the qualifications clause of the United States constitution and the doctrine of federal supremacy. The term limit amendment, as drafted, is unconstitutional.

/s/ Chris Piazza
JUDGE CHRIS PIAZZA

7-29-93
DATE

APPENDIX D

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

No. 92-6171

BOBBIE E. HILL, Individually, And On Behalf of THE
LEAGUE OF WOMEN VOTERS OF ARKANSAS And All
Others Similarly Situated, and DICK HERGET, Individu-
ally And On Behalf of All Others Similarly Situated,
Plaintiffs

vs.

JIM GUY TUCKER, Governor of the State of Arkansas;
et al.,

Defendants

STATE OF ARKANSAS EX REL. ATTORNEY GENERAL
WINSTON BRYANT,
Intervenor/Defendant

ARKANSAS [*sic*] FOR GOVERNMENTAL REFORM, *et al.*,
Intervenor/Defendant

AMERICANS FOR TERM LIMITS, *et al.*,
Intervenor/Defendant

U. S. TERM LIMITS, INC., *et al.*,
Intervenor/Defendant

FINDINGS OF FACT,
CONCLUSIONS OF LAW
and FINAL ORDER

This Court on July 29, 1993, filed Conclusions of Law which held that Amendment 73 of the Arkansas Constitution, Section 3, violates the United States Constitution

by adding additional qualifications for the Office of United States Senator and Representative, that Sections one (1) and two (2) of Amendment 73 are severable from Section 3 pursuant to the severability clause found in Section 6, and, further, that Amendment 73 is void and unenforceable for lack of an Enacting Clause.

The State of Arkansas, Ex Rel., Attorney General Winston Bryant, Intervenor/Defendants, filed a Motion to Dismiss As To The Enacting Clause of the Initiative Petition for Lack of Jurisdiction. Arkansans for Governmental Reform, Inc., *et al*, Intervenor/Defendants, and U. S. Term Limits, Inc., Intervenor/Defendants, filed responses adopting the Attorney General's motion.

They argue that Amendment 7 sets forth the procedure for contesting the sufficiency of a petition, giving original jurisdiction to the Arkansas Supreme Court. They further allege that after a vote on the petition its sufficiency is of no importance, citing *Beene v. Hutto*, 192 Ark. 848, 96 S.W.2d 485 (1936) as authority for their position.

Amendment 7 to the Arkansas Constitution reads:

(A) Sufficiency—The sufficiency of all State-wide petitions shall be decided in the first instance by the Secretary of State, subject to review by the Supreme Court of the State, which shall have original and exclusive jurisdiction over all such causes. The Sufficiency of all local petitions shall be decided in the first instance by the county clerk or the city clerk, as the case may be subject to review by the Chancery Court.

(B) Court Decisions—If the sufficiency of any petition is challenged such cause shall be a preference cause and shall be tried at once, but the failure of the courts to decide prior to the election as to the sufficiency of any such petition shall not prevent the question from being placed upon the ballot at the election named in such petition, nor militate against

the validity of such measure, if it shall have been approved by a vote of the people.

Beene v. Hutto, *supra*, affirmed the Constitutional requirement that the sufficiency of initiated petitions must be contested before the vote of the people, rendering a subsequent suit moot.

Amendment 7 further requires:

(C) Enacting Clause—The style of all the bills initiated and submitted under the provisions of this section shall be, "Be It Enacted by the People of the State of Arkansas" (municipality, or county as the case may be). In submitting measures to the people, the Secretary of State and all other officials shall be guided by the general election laws or municipal laws, as the case may be, until additional legislation is provided therefor.

This Court finds that Amendment 73 contains no enacting clause. The preamble contains the following language, "[t]herefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of elected officials."¹ The conclusion of the petition reads, "and by this our petition order that the same be submitted to the people of said State that the same may be adopted, enacted or rejected by the vote of legal voters . . ."

The proposed petition and initiated act in *Hailey v. Carter*, 221 Ark. 20, 22, 251 S.W.2d 826 (1952) contained the following language, "(Initiated by Petition of the People) . . . "And by this, our petition, we order that the same be submitted to the people of said Carroll County to the end that the same may be adopted or rejected by a vote of the legal voters of said county . . ." As in the case at bar, the proposed measure in *Hailey*

¹ When the Arkansas Supreme Court exercised original jurisdiction over Amendment 73 in *Plugge v. McCuen*, 310 Ark. 654, 841 S.W.2d 139 (1992) Justice Glaze ruled that the "preamble or title simply is not a part of a measure." p. 157 (emphasis added).

contained no enacting clause and was held to be constitutionally defective.²

In *Plugge v. McCuen*, supra, the Arkansas Supreme Court declined to rule on the issue that Amendment 73 lacked an enacting clause and other constitutional issues.

Undoubtedly, a strong case can be made concerning the Term Limitation Amendment's invalidity both under Arkansas's and the United States' Constitutions, and voters should be aware that their votes for or against this measure may ultimately have value only as an expression of public sentiment on the subject. In short, a future judicial proceeding will be required to decide the Amendment's validity if it is adopted by the people. If that occurs, the constitutional arguments posited here will then be placed squarely before us and can be decided after due and proper consideration. *Plugge* at 661.

Amendment 7 is an expression of the people of this state to allow its citizens to change the constitution. In order to facilitate change, the people, through Amendment 7, required challenges to the sufficiency of the petition to be heard before a vote at a general election. They

² Amendment 73 does not present a question of substantial compliance for there is no enacting clause in this measure. See *Ferrell v. Keel*, 105 Ark. 380, (1912), which can be read to allow substantial compliance when there is an enacting clause in the measure with language substantially similar to that required by the Constitution. If, for example, Amendment 73 had an enacting clause which read "Be it ordained, adopted or enacted, by the people of . . ." we may have a different result. *Ferrell v. Keel* was decided under prior law, but it contains a discussion of the enacting clause and gives a historical perspective of the use of the term "bills" for both legislative acts and measures initiated by the people. This issue was raised belatedly by the Arkansans for Governmental Reform. Amendment 7 pertains to initiatives and referendums not to constitutional measures submitted to the people by the legislature. Amendment 7 requires an Enacting Clause as the style of all bills initiated and submitted by the people under this section. A measure includes the term "bill".

also required that each measure have an enacting clause to show the authority by which the measure is enacted into law and its source of power under the constitution. *Ferrell v. Keel*, supra, *Vinsant v. Knox*, 27 Ark. 266 (1871). The instant case is not one involving a challenge to the sufficiency of the ballot title or the number of signatures on the petition, but is a challenge to an amendment which lacks a constitutionally mandated provision.

While there is presumption of validity in favor of a constitutional amendment that has been approved by the voters, if constitutional requirements are disregarded, ". . . or compliance totally omitted, the courts, upon appropriate application, will hold that the amendment was not properly adopted, a favorable vote at a general election notwithstanding." (emphasis added). *Chaney v. Bryant*, 259 Ark. 294, 298, 532 S.W.2d 741 (1976).

A case directly on point which delineates the Court's role relative to a constitutional requirement which was absent in an adopted amendment is *McAdams v. Henley*, 169 Ark. 97 (1925), where the Arkansas General Assembly authorized a road improvement district in Craighead County and contributed money to build a bridge over the Cache River. The issue was whether Amendment 12 to the Arkansas Constitution, which prohibited the legislature from passing local laws, was legally adopted in 1924. Article 19 section 22 of the Constitution of 1874 allowed the General Assembly to propose amendments to the Constitution "if the same be agreed to by a majority of all members elected to each house, such proposed amendments shall be entered on the journals with the yeas and nays" (emphasis added).

Amendment 12 was adopted on a vote of the people at the general election of 1924, but the Senate journal did not reflect a vote on a House Amendment as required by Article 19 section 22.

In *McAdams v. Henley*, supra, Justice McCulloch expressed the court's function at p. 103,

"The Constitution is the supreme and paramount law. The mode by which amendments are to be made under it is clearly defined. It is said that certain acts are to be done, certain requisitions are to be observed before a change can be effected. But to what purpose are these acts required or the requisitions enjoined, if the Legislature or any other department of the government can dispense with them? To do so would be to violate the instrument they are sworn to support; and every principle of public law and sound constitutional policy requires the court to pronounce against every amendment which is shown not to have been made in accordance with the rules prescribed by the fundamental law." citing *Collier v. Frierson*, 24 Ala. 108.

The Arkansas Supreme Court held that the constitutional provision was mandatory, and the constitutional amendment which was approved in a General election was declared void.

"But questions of policy are not questions for the courts. They are wrought out and found out in the Legislature and before the people. Here the single question is one of power. We make no laws; we change no constitutions; we inaugurate no policy . . . When a constitutional amendment has been submitted, the single inquiry for us is, whether it has received the sanction of popular approval in the manner prescribed by the fundamental law. So that, whatever may be the individual opinions of the justices of this court as to the wisdom or folly of any law or constitutional amendment, and notwithstanding the right which as individual citizens we may exercise with all other citizens in expressing through the ballot box our personal approval or disapproval of proposed constitutional changes, as a court, our

single inquiry is, have constitutional requirements been observed, and limits of power been regarded? We have no veto. The judge who casts his individual opinions of wisdom or policy into the decision of questions of constitutional limitations and powers, simply usurps a prerogative never committed to him in the wise distribution of duties made by the people in their fundamental law." *McAdams v. Henley*, supra, p. 111, citing *Prohibitory-Amendment Cases*, 24 Kan. 700.

Many years ago the people of this state provided a method for future Arkansans to change the Constitution. They mandated that the measure *shall have* an enacting clause showing the source of the power. Whatever the reason, the body politic deemed this provision important and it is the constitutional law of this State. As a Judicial Officer sworn to uphold the Constitution, this Court does not have the power to change a duly enacted constitutional provision which has been affirmed by the Arkansas Supreme Court.

FINAL ORDER

Upon consideration of the arguments of counsel during hearings on July 29, 1993, and September 7, 1993, statements of Law filed by the parties and the Conclusions of Law, incorporated word for word herein, filed by the Court on July 29, 1993, and on this date, the Court enters the following order:

1. Section 3 of Amendment 73 violates Article I, Section 2, Clause 2 and Article I, Section 3, Clause 3 of the United States Constitution by adding additional qualifications for candidates for the offices of United States Senator and Representative.

2. Section 3 of Amendment 73 does not violate the First and Fourteenth Amendments to the United States Constitution.

3. Sections 1 and 2 of Amendment 73 do not violate the First and Fourteenth Amendments to the United States Constitution.

4. Amendment 73 does not violate Article IV, Section 3 of the United States Constitution.

5. Sections 1 and 2 of Amendment 73 are not invalid because they were combined with unconstitutional limits on United States Senators and Representatives.

6. The court cannot conclude that the voter's [*sic*] dislike for incumbent United States Senators and Representatives was overwhelming to the extent that it caused voters to impose state limits on officers, senators and representatives.

7. Sections 1 and 2 of Amendment 73 are severable from Section 3 pursuant to the severability clause in Section 6 thereof.

8. Amendment 73 is void and unenforceable for lack of an Enacting Clause.

9. The Motion for Partial Summary Judgment filed by Defendant Ray Thornton is hereby granted.

10. The Motion to Dismiss the Cross Claim of Defendant Ray Thornton, filed by the State of Arkansas Ex. Rel. Attorney General Winston Bryant, is denied.

11. The Motion to Dismiss the Cross Claim of the Unified Members, filed by the State of Arkansas Ex. Rel. Attorney General Winston Bryant, is denied.

12. The Motion to Dismiss Unnamed Citizens, Residents, Taxpayers and Voters, the League of Women Voters, and all defendants named in the Amended Complaint filed by the State of Arkansas Ex. Rel. Attorney General Winston Bryant is denied, as is the Motion filed August 18, 1993, to dismiss certain parties.

13. The Motion for Summary Judgment filed by George O. Jernigan, Jr. and the Democratic Party of Arkansas is denied as moot.

14. The Motion for Partial Summary Judgment filed by the Unified Members is denied. With regard to the issue of whether or not the amendment is prospective or retroactive, the Court holds that the issue is moot pursuant to the Court's ruling that Amendment 73 is unconstitutional.

15. The Motion for Summary Judgment under Counts I through IV of the Amended Complaint filed by U. S. Term Limits, Inc., *et al.* is denied.

16. The Motions to realign the parties to establish procedural guidelines and to make findings on pending motions filed by the State of Arkansas Ex. Rel. Attorney General Winston Bryant is denied.

17. The Motion to Dismiss filed by Governor Jim Guy Tucker is hereby granted.

18. The Motion to Dismiss the Amended Complaint and Cross Complaints, filed by Intervenors Arkansans for Governmental Reform, *et al.*, is denied.

19. The Motion to Dismiss the Amended Complaint, filed by the State of Arkansas Ex. Rel. Attorney General Winston Bryant, is denied.

20. The Motion to Dismiss the Cross Claim of Defendant George O. Jernigan, Jr. and the Democratic Party, filed by the State of Arkansas Ex. Rel. Attorney General Winston Bryant, is denied.

21. The Motion to Dismiss as to the Enacting Clause of the Initiative Petition for Lack of Jurisdiction, filed by the Intervenors/Defendants, is hereby denied.

22. The Motion for Summary Judgment on the Amended Complaint filed by Plaintiffs is granted in part for the reasons stated at the hearing herein on July 29, 1993, at the hearing on September 5, 1993, the Conclusions of Law filed July 29, 1993, and the Conclusions of Law and Findings of Fact filed today. Amendment 73 is hereby declared void and invalid.

23. This order is intended to fully and finally resolve all issues, claims and defenses raised by the parties.

ORDERED This 8th day of September, 1993

/s/ Chris Piazza
JUDGE CHRIS PIAZZA

APPENDIX E

The Constitution of the United States provides in part:

* * * *

ARTICLE I

* * * *

SECTION 2. The House of Representatives shall be composed of Members chosen every second year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

* * * *

SECTION 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

* * * *

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

* * * *

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.

SECTION 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

* * * *

SECTION 5. Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members

* * * *

SECTION 6.

* * * *

. . . [N]o person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

* * * *

SECTION 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War,

unless actually invaded, or in such imminent Danger as will not admit of delay.

* * * *

ARTICLE IV

* * * *

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

* * * *

ARTICLE VI

* * * *

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

* * * *

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * *

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

* * * *

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

* * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

* * * *

AMENDMENT XVII

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

* * * *

AMENDMENT XIX

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

* * * *

AMENDMENT XXIV

SECTION 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

* * * *

AMENDMENT XXVI

SECTION 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

Arkansas Constitution, Amendment 73, provides:

PREAMBLE:

The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of elected officials.

SECTION 1—Executive Branch

(a) The Executive Department of this State shall consist of a Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, all of whom shall keep their offices at the seat of government, and hold their offices for the term of four years, and until their successors are elected and qualified.

(b) No elected officials of the Executive Department of this State may serve in the same office more than two such four year terms.

SECTION 2—Legislative Branch

(a) The Arkansas House of Representatives shall consist of members to be chosen every second year by the qualified electors of the several counties. No member of the Arkansas House of Representatives may serve more than three such two year terms.

(b) The Arkansas Senate shall consist of members to be chosen every four years by the qualified electors of the several districts. No member of the Arkansas Senate may serve more than two such four year terms.

SECTION 3—Congressional Delegation

(a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas.

(b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas.

SECTION 4—Severability.

The provisions of this Amendment are severable, and if any should be held invalid, the remainder shall stand.

SECTION 5—Provisions Self-Executing

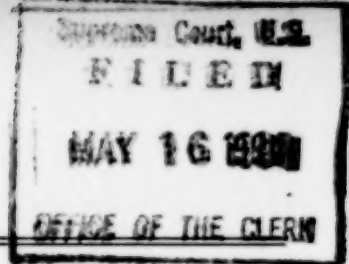
Provisions of this Amendment shall be self-executing.

SECTION 6—Application

(a) This Amendment to the Arkansas Constitution shall take effect and be in operation on January 1, 1993, and its provisions shall be applicable to all persons thereafter seeking election to the offices specified in this Amendment.

(b) All laws and constitutional provisions which conflict with this Amendment are hereby repealed to the extent that they conflict with this amendment.

(2)
No. 93-1456



In The
Supreme Court of the United States
October Term, 1993

U.S. TERM LIMITS, INC., ARKANSANS FOR
GOVERNMENTAL REFORM, INC., FRANK GILBERT,
GREG RICE, LON SCHULTZ AND SPENCER PLUMLEY,

Petitioners,

v.

RAY THORNTON, BLANCHE LAMBERT, DALE
BUMPERS, AND DAVID PRYOR, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Arkansas

**BRIEF IN OPPOSITION OF RESPONDENTS BOBBIE
HILL, ON BEHALF OF THE LEAGUE OF WOMEN
VOTERS OF ARKANSAS AND DICK HERGET**

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*Attorneys for Respondents,
Bobbie Hill, on behalf of
The League of Women Voters of
Arkansas and Dick Herget*

*Counsel of Record

QUESTION PRESENTED

May a state disqualify a multi-term incumbent in the U.S. House of Representatives or Senate from being certified as a candidate or having his name placed on the ballot for reelection to the same office?

LIST PURSUANT TO RULE 29.1

Respondent The League of Women Voters of Arkansas is a non-profit corporation incorporated under the laws of the State of Arkansas. It has no parent companies or subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
LIST PURSUANT TO RULE 29.1.....	ii
TABLE OF AUTHORITIES.....	iv
STATEMENT	1
ARGUMENT	7
I. THE ARKANSAS SUPREME COURT'S DECISION IS CONSISTENT WITH ALL OTHER LOWER COURT DECISIONS.....	7
II. THE ARKANSAS SUPREME COURT'S DECISION IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISIONS.....	12
III. THIS COURT SHOULD AWAIT FURTHER DECISIONS IN OTHER STATE AND LOWER FEDERAL COURTS BEFORE TAKING UP THE CONSTITUTIONALITY OF STATE IMPOSED TERM LIMITS FOR FEDERAL OFFICE HOLDERS	15
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

<i>American Party of Texas v. White</i> , 415 U.S. 767 (1974)	14
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	12, 14
<i>Application of Ferguson</i> , 294 N.Y.S.2d 174 (N.Y. Sup. Ct.), <i>aff'd</i> 294 N.Y.S.2d 989 (App. Div. 1968)	10
<i>Bond v. Floyd</i> , 385 U.S. 116 (1966)	13
<i>Buckingham v. State</i> , 35 A.2d 903 (Del. 1944)	10
<i>Burdick v. Takushi</i> , 112 S.Ct. 2059 (1992)	12, 14
<i>Clements v. Fashing</i> , 457 U.S. 957 (1982)	14
<i>Cobb v. State</i> , 722 P.2d 1032 (Haw. 1986)	11
<i>Danielson v. Fitzsimmons</i> , 44 N.W.2d 484 (Minn. 1950)	10
<i>Davis v. Adams</i> , 400 U.S. 1203 (1970) (Black, J. Cir. Justice)	13
<i>Dillon v. Fiorina</i> , 340 F.Supp. 729 (D.N.M. 1972)	10
<i>Duggan v. Beerman</i> , No. 485 (Dist. Ct., Lancaster Co., Neb., September 28, 1992. Appeal pending No. S-92-907 (S.Ct. Neb.)	10, 15
<i>Ekwall v. Stadelman</i> , 30 P.2d 1037 (Or. 1934)	10
<i>Exon v. Tiemann</i> , 279 F.Supp. 609 (D. Neb. 1968)	10
<i>Hellmann v. Collier</i> , 141 A.2d 908 (Md. 1958)	10
<i>Hopfmann v. Connolly</i> , 746 F.2d 97 (1st Cir. 1984), <i>vacated on other grounds</i> , 471 U.S. 459 (1985)	12
<i>In re O'Connor</i> , 17 N.Y.S.2d 758 (1940)	10

TABLE OF AUTHORITIES - Continued

Page

<i>In re Opinion of Judges</i> , 116 N.W.2d 233 (S.D. 1962)	10
<i>Jenness v. Fortson</i> , 403 U.S. 431 (1971)	14
<i>Joyner v. Mofford</i> , 706 F.2d 1523 (9th Cir. 1983), <i>cert. denied</i> , 464 U.S. 1002 (1983)	11, 13
<i>Lowe v. Fowler</i> , 240 S.E.2d 70 (Ga. 1977)	10
<i>Lubin v. Panish</i> , 415 U.S. 709 (1974)	12, 14
<i>Plante v. Smith</i> , Case No. 92-CV-40410 (U.S.D.C. N.D. Fla.)	15
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969) 4, 9, 10, 12, 13	
<i>Public Citizen, Inc. v. Miller</i> , 813 F.Supp. 821 (N.D. Ga.), <i>aff'd Mem.</i> , 992 F.2d 1548 (11th Cir. 1993)	12, 13
<i>Richardson v. Hare</i> , 160 N.W.2d 883 (Mich. 1968)	10
<i>Riley v. Cordell</i> , 194 P.2d 857 (Okla. 1948)	10
<i>Shub v. Simpson</i> , 76 A.2d 332 (Md.), <i>appeal dismissed</i> , 340 U.S. 881 (1950)	10
<i>Signorelli v. Evans</i> , 637 F.2d 853 (2nd Cir. 1980)	11, 12, 13
<i>Stack v. Adams</i> , 315 F.Supp. 1295 (N.D. Fla. 1970)	10
<i>State ex rel. Chandler v. Howell</i> , 104 Wash. 99, 175 P. 569 (1918)	10
<i>State ex rel. Chavez v. Evans</i> , 446 P.2d 445 (N.M. 1968)	10
<i>State ex rel. Eaton v. Schmahl</i> , 167 N.W. 481 (Minn. 1918)	10

TABLE OF AUTHORITIES – Continued

Page

<i>State ex rel. Handley v. Superior Court</i> , 151 N.E.2d 508 (Ind. 1958)	10
<i>State ex rel. Johnson v. Crane</i> , 197 P.2d 864 (Wyo. 1948)	11
<i>State ex rel. Pickrell v. Senner</i> , 375 P.2d 728 (Ariz. 1962)	10
<i>State ex rel. Santini v. Swackhamer</i> , 521 P.2d 568 (Nev. 1974)	10
<i>State ex rel. Watson v. Cobb</i> , 2 Kan. 32, 58 (1863)	11
<i>State ex rel. Wettengel v. Zimmerman</i> , 24 N.W.2d 504 (Wis. 1946)	10
<i>Stockton v. MacFarland</i> , 106 P.2d 328 (Ariz. 1940)	10
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	14
<i>Strong v. Breaux</i> , 612 So.2d 111 (La. Ct. App. 1st Cir. 1992)	10
<i>Stumpf v. Lau</i> , 108 Nev. 826, 839 P.2d 120 (1992)	8, 9
<i>Thorsted v. Gregoire</i> , 841 F.Supp. 1068 (W.D. Wash. 1994) (appeal pending) (Nos. 94-35222 and 94-35223, U.S.C.A., 9th Cir.)	7, 8, 9, 15
<i>United States v. Richmond</i> , 550 F.Supp. 605 (E.D.N.Y. 1982)	10

OTHER AUTHORITIES

Arkansas Constitution, Amendment 73	<i>passim</i>
U.S. Constitution, Article I	<i>passim</i>
U.S. Constitution, Article I, Sections 2 and 3	8
U.S. Constitution, Article I, Section 4	14

TABLE OF AUTHORITIES – Continued

Page

U.S. Constitution, First Amendment	3, 6, 7
U.S. Constitution, Fourteenth Amendment	3, 6, 7
Wash.Rev.Code § 29.68	8

No. 93-1456

—◆—
In The
Supreme Court of the United States
October Term, 1993
—◆—

U.S. TERM LIMITS, INC., ARKANSANS FC.
GOVERNMENTAL REFORM, INC., FRANK GILBERT,
GREG RICE, LON SCHULTZ AND SPENCER PLUMLEY,
Petitioners,

v.

RAY THORNTON, BLANCHE LAMBERT, DALE
BUMPERS, AND DAVID PRYOR, et al.,
Respondents.

—◆—
On Petition For Writ Of Certiorari
To The Supreme Court Of Arkansas
—◆—

**BRIEF IN OPPOSITION OF RESPONDENTS BOBBIE
HILL, ON BEHALF OF THE LEAGUE OF WOMEN
VOTERS OF ARKANSAS AND DICK HERGET**
—◆—

Respondents, Bobbie Hill, on behalf of The League of
Women Voters of Arkansas and Dick Herget pray that the
Petition for Writ of Certiorari to the Supreme Court of
Arkansas be denied.

—◆—
STATEMENT

As noted by Petitioners, in November 1992 Arkansas
voters approved Amendment 73 to their State Constitution.

The Amendment's official popular name was the Arkansas Term Limitations Amendment. (A.2a) Although partially quoted in the Petition, the full preamble to the Amendment states:

PREAMBLE:

The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, *herein limit the terms of the elected officials.*

(A.3a-4a Emphasis added)

The Amendment contained specific provisions pertaining to candidates for the United States House of Representatives and the United States Senate. The Amendment provided as follows:

Section 3 – Congressional Delegation

(a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas.

(b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be certified as a candidate and shall not be eligible to have his/

her name placed on the ballot for election to the United States Senate from Arkansas.

A.4a-5a

Contrary to the summary of these provisions provided in the Petition at page 2, these provisions not only prohibit an incumbent's name from appearing on the ballot, but also deprive him of the opportunity to be certified as a candidate of a political party or as an independent candidate. Indeed, a literal reading prohibits even the possibility of a write in vote. The ban continues after the individual leaves office: once the specified terms have been served the individual is permanently banned as a candidate for the office.

Respondents Hill, on behalf of The League of Women Voters of Arkansas, and Herget filed suit for declaratory judgment in the Circuit Court of Pulaski County, Arkansas. Respondents alleged that Amendment 73 violated Article I of the United States Constitution by impermissibly adding qualifications to the standing qualifications for the offices of U.S. Representatives and U.S. Senators. Respondents further alleged that the Amendment violated respondents' speech and associational rights under the First and Fourteenth Amendments. Joined as defendants in the action for purposes of a declaratory judgment were members of Arkansas' Congressional Delegation, state legislators, state executive office holders and the Arkansas Democratic and Republican Parties.

The trial court granted Respondents and Congressman Ray Thornton's Motions for Summary Judgment in

part. Petitioners and others appealed to the Arkansas Supreme Court.

Concerning Amendment 73's attempt to limit the terms of incumbent United States Senators and Representatives, five of the Arkansas Supreme Court justices found that these provisions violated the Qualifications Clauses of Article I of the United States Constitution. In the plurality opinion, Justice Robert Brown, joined by two other justices, reviewed the historical evidence pertaining to the framers' intent as to the exclusive nature of the Qualifications Clauses including the Constitutional Convention's rejection of a provision requiring "rotation" in office for representatives. (A.12a) In addition, the Arkansas Supreme Court reviewed this Court's discussion of the framer's intent and its conclusion in *Powell v. McCormack*, 395 U.S. 486 (1969) that the constitutional qualifications are exclusive.

Based on this review, the plurality opinion said:

Qualifications set out in the U.S. Constitution, unalterable except by amendment to that document, is a conclusion that makes eminently good sense. If there is one watchword for representation of the various States in Congress, it is uniformity. Federal legislators speak to national issues that affect the citizens of every state. Additional age restrictions, residency requirements, or sundry experience criteria established by the States would cause variances in this uniformity and lead to an imbalance among the states with respect to who can sit in Congress. This is precisely what we believe the drafters of the U.S. Constitution intended to avoid. The uniformity in qualifications mandated in Article

I provides the tenor and the fabric for representation in the Congress. Piecemeal restrictions by State would fly in the face of that order.

A.14a

The plurality opinion also rejected petitioners' argument that Section 3 of Amendment 73 was simply a ballot regulation by the State permissible under Article I, Section 4 of the United States Constitution and stated:

This effort to dress eligibility to stand for congress in ballot access clothing, that is, as a regulatory measure falling within the state's ambit under Article I, Section 4, is not without some rational appeal. We do not agree, however, that excluding a broad category of persons from seeking election to congress is a mere exercise of regulatory power. The intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service.

A.14a-15a

In a separate opinion, Associate Justice Dudley concurred in the majority's holding that Amendment 73 violated Article I of the United States Constitution, citing three reasons:

First, the framers rejected the idea of term limits in drafting the Constitution. Second, allowing a several state to create qualifications for national office holders is antithetical to republican values. Third, the imposition of term limitations upon members of the Congress of the United States would violate the Qualifications Clause of the Constitution because it would add a qualification - lack of incumbency

– to the requirements that are fixed by the Constitution and the several states do not have this power.

A.26a

Likewise, Justice Dudley joined in rejecting any argument that Section 3 was mere ballot regulation:

The argument that a candidate is only barred from appearing on the ballot, but is not barred as a write in candidate, is appealing at first blush, but when one thinks about it the issue becomes clear because, as a practical matter, the Amendment would place term limits on service in the Congress. I am reassured by the style of this case, *U.S. Term Limits, Inc.* That name implies just what this Amendment is: a practical limit on the terms of the members of the Congress. The fact that a person can conceivably be elected as a write in candidate does not vitiate the fact that, as a practical matter, write in candidates are at a distinct disadvantage. The result would be that the qualifications clause would be violated by the Amendment.

A.27a

By separate opinion, Special Justice Gerald Brown also concurred with a majority opinion that Amendment 73 violated the Qualifications Clauses of the United States Constitution. A.41a Because a majority of the court found that Section 3 of Amendment 73 violated Article I of the United States Constitution, and rejected attempts to label Section 3 as a mere ballot regulation.

Because of the majority's ruling that Amendment 73 violated Article I, it was unnecessary for the Arkansas

Court to reach respondents' argument that, in the alternative, Section 3 of Amendment 73 also violated respondents' First and Fourteenth Amendment rights.

ARGUMENT

There is no need for this Court to accept this case. The Arkansas Supreme Court's decision is consistent with the decision of every other lower court that has ruled on the issue. Further, Arkansas Supreme Court's decision is consistent with this Court's decisions; indeed, it is compelled by the decision in *Powell*. Finally, the issue is still being considered by other state and lower federal courts and, this Court will have ample opportunity to consider the constitutionality of term limits, should a conflict arise. Indeed, this case is a poor one to consider the issue, because the Arkansas Amendment imposes a lifetime bar whose unconstitutionality is especially clear.

I. THE ARKANSAS SUPREME COURT'S DECISION IS CONSISTENT WITH ALL OTHER LOWER COURT DECISIONS

In holding that Amendment 73 violated the standing qualification clauses of Article I of the United States Constitution, the Arkansas Supreme Court reached the same conclusion as every other court that has considered whether a state may constitutionally impose term limits on federal office holders. See *Thorsted v. Gregoire*, 841 F.Supp. 1068 (W.D. Wash. 1994) (appeal pending) (Nos.

94-35222 and 94-35223, U.S.C.A., 9th Cir.); *Stumpf v. Lau*, 108 Nev. 826, 839 P.2d 120 (1992).

In *Thorsted*, the district court enjoined a voter initiated measure approved by Washington voters in the November 1992 general election. Initiative Measure 573, codified at Wash.Rev.Code § 29.68, provided in pertinent part:

No person is eligible to appear on the ballot or file a declaration of candidacy for the United States House of Representatives who, by the end of the then current term of office will have served, or but for resignation would have served, as a member of the United States House of Representatives during six of the previous 12 years. . . . No person is eligible to appear on the ballot or file a declaration of candidacy for the United States Senate who, by the end of the then current term of office will have served, or but for resignation would have served, as a member of the United States Senate during 12 of the previous 18 years.

Without hesitation, the district court concluded that Initiative 573 imposed additional qualifications for Congress in violation of Article I, Sections 2 and 3 of the United States Constitution. In a well reasoned opinion, the district court reached the same conclusion as the Arkansas Supreme Court, i.e., the provisions amounted to state imposed qualifications for congressional office and thus violated Article I, Sections 2 and 3. The district court rejected the arguments of U.S. Term Limits and others that Initiative 573 was a mere ballot regulation. The district court, however, held in the alternative, that even if viewed as a ballot regulation Initiative 573 violated the

plaintiffs' rights under the First and Fourteenth Amendments.

In *Stumpf v. Lau*, the Nevada Supreme Court rejected a similar voter initiative limiting the terms of congressional office holders. The court held, *inter alia*, that the initiative violated Article I of the United States Constitution. The Nevada Court reasoned:

[I]f the initiative were approved by the voters, Nevada would be approving a law or an amendment of the State Constitution that was violative of the United States Constitution and clearly beyond the powers of this State to enact.

839 P.2d at 121.

Just as in the Arkansas term limitations amendment, the Nevada proposal was expressed in terms of eligibility to have one's name printed on the election ballot, not in terms of an explicit qualification for office. The Nevada Supreme Court rejected this attempt to justify the provision and held that the initiative petition "clearly and palpably violates the qualification clauses of Article I of the United States Constitution." 839 P.2d at 120.

In both *Thorsted* and *Stumpf*, the courts reached their decision based on this Court's decision in *Powell v. McCormack*, *supra*, that Article I of the United States Constitution sets forth a list of qualifications for service in the House and that the founders intended that the qualifications to be exclusive.¹

¹ Petitioners indicate that a Nebraska court has rejected constitutional challenges to state imposed term limits for congressional office holders. (Petition at page 8, footnote 9) In

State and federal courts have been unanimous both before and after this Court's decision in *Powell v. McCormack* in holding that states may not impose additional qualifications for federal offices beyond those found in the United States Constitution. These courts have rejected residency requirements;² felony disqualifications;³ disloyalty disqualifications;⁴ and disqualification of state officials.⁵

reality, the trial court refused to reach the constitutional issue finding that it was not ripe. *Duggan v. Beerman*, No. 485 (Dist. Ct., Lancaster Co., Neb., September 28, 1992. Appeal pending No. S-92-907 (S.Ct. Neb.).

² *Dillon v. Fiorina*, 340 F.Supp. 729 (D.N.M. 1972); *Exon v. Tiemann*, 279 F.Supp. 609 (D. Neb. 1968) (three-judge court); *State ex rel. Chavez v. Evans*, 446 P.2d 445 (N.M. 1968); *Hellmann v. Collier*, 141 A.2d 908 (Md. 1958); cf. *Strong v. Breaux*, 612 So.2d 111, 112 (La. Ct. App. 1st Cir. 1992).

³ *Application of Ferguson*, 294 N.Y.S.2d 174 (N.Y. Sup. Ct.), aff'd 294 N.Y.S.2d 989 (App. Div. 1968); *Danielson v. Fitzsimmons*, 44 N.W.2d 484 (Minn. 1950); *In re O'Connor*, 17 N.Y.S.2d 758 (1940); *State ex rel. Eaton v. Schmahl*, 167 N.W. 481 (Minn. 1918); cf. *United States v. Richmond*, 550 F.Supp. 605 (E.D.N.Y. 1982).

⁴ *Shub v. Simpson*, 76 A.2d 332 (Md.), appeal dismissed, 340 U.S. 881 (1950); *In re O'Connor*, 17 N.Y.S.2d 758 (1940).

⁵ *Stack v. Adams*, 315 F.Supp. 1295 (N.D. Fla. 1970) (three-judge court); *State ex rel. Pickrell v. Senner*, 375 P.2d 728 (Ariz. 1962); *Stockton v. MacFarland*, 106 P.2d 328 (Ariz. 1940); *Buckingham v. State*, 35 A.2d 903, 905 (Del. 1944); *Lowe v. Fowler*, 240 S.E.2d 70 (Ga. 1977); *State ex rel. Handley v. Superior Court*, 151 N.E.2d 508 (Ind. 1958); *Richardson v. Hare*, 160 N.W.2d 883, 887-88 (Mich. 1968); *State ex rel. Santini v. Swackhamer*, 521 P.2d 568 (Nev. 1974); *Riley v. Cordell*, 194 P.2d 857 (Okla. 1948); *Ekwall v. Stadelman*, 30 P.2d 1037 (Or. 1934); *In re Opinion of Judges*, 116 N.W.2d 233 (S.D. 1962); *State ex rel. Chandler v. Howell*, 104 Wash. 99, 175 P. 569 (1918); *State ex rel. Wettengel v. Zimmerman*, 24

The Arkansas Supreme Court's decision is also consistent with decisions of United States Courts of Appeals which have recognized the difference between an impermissible attempt to add substantive qualifications for federal office and permissible (1) ballot regulation designed to promote orderly elections and (2) regulation of the activities of state officeholders. See *Joyner v. Mofford*, 706 F.2d 1523 (9th Cir. 1983), cert. denied, 464 U.S. 1002 (1983); *Signorelli v. Evans*, 637 F.2d 853 (2nd Cir. 1980). For example, both the Ninth and Second Circuits recognize that a state has a valid interest in regulating the outside activities of its state office holders, but at the same time recognize the state's inability to add substantive qualifications for federal office holders. As noted by the Ninth Circuit in *Joyner*, quoting *State ex rel. Watson v. Cobb*, 2 Kan. 32, 58 (1863):

While we cannot interfere with the tenure of office which the United States may prescribe for its officers, it is clearly within our province to declare what effect the acceptance of such an office will have on the tenure of an officer of the state . . . when that is declared by the state constitution. . . .

Id. at 1531. Likewise in *Signorelli*, the Second Circuit noted:

It can be argued that New York's purpose is to regulate the judicial office that Signorelli holds, not the congressional office he seeks. There is a distinct risk, however, that this line of

N.W.2d 504 (Wis. 1946); *State ex rel. Johnson v. Crane*, 197 P.2d 864 (Wyo. 1948); see also *Cobb v. State*, 722 P.2d 1032 (Haw. 1986).

argument . . . would permit the states, exercising their acknowledged authority to regulate occupations, to require lawyers to resign from the bar or business executives to resign corporate offices prior to seeking public office. But such a sweeping elimination of broad categories of people from those eligible for election would conflict with the express intent of the framers to maintain broad public choices of elected representatives.

637 F.2d at 859.

Contrary to petitioners' assertion, *Hopfmann v. Connolly*, 746 F.2d 97 (1st Cir. 1984), *vacated on other grounds*, 471 U.S. 459 (1985) and *Public Citizen, Inc. v. Miller*, 813 F.Supp. 821 (N.D. Ga.), *aff'd Mem.*, 992 F.2d 1548 (11th Cir. 1993), are not to the contrary. Both cases involve merely procedural ballot access ground rules, not qualifications for office. Indeed, the court in *Public Citizen* agreed that states may not add qualifications for election to Congress. Further, neither court addressed this Court's decisions holding that the ability to run as a write in candidate is not an adequate substitute for appearing on the printed ballot.⁶

II. THE ARKANSAS SUPREME COURT'S DECISION IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISIONS

In *Powell v. McCormack*, 395 U.S. 486 (1969), this Court held that Congress could not impose additional qualifications for its membership outside of the three specified in

⁶ *Anderson v. Celebrezze*, 460 U.S. 780, 799 n. 26 (1983); *Burdick v. Takushi*, 112 S.Ct. 2059, 2067 n. 7 (1992); *Lubin v. Panish*, 415 U.S. 709, 719 n. 5 (1974).

Article I – age, citizenship, and residency. Although *Powell* did not involve a state imposed qualification, its reasoning is controlling here. The Court held that the framers intended the constitutional qualifications to be exclusive. This holding was based on an exhaustive review of historical evidence available as to the framers' intent and congressional reports on similar issues. 395 U.S. at 542-47. This Court quoted with favor both Alexander Hamilton and James Madison's comments in the *Federalist Papers* on the fixed nature of the Article I qualifications.⁷ Indeed, in reviewing a decision by the House of Representatives to seat a congressman in contradiction of a state imposed residency requirement, this Court referred to the question of a state's ability to add qualifications as a "more narrow issue." *Id.* at 542-543.

Numerous courts have correctly interpreted *Powell* to prohibit states from adding to the qualifications stated in the Constitution. *Joyner v. Mofford*, 706 F.2d 1523, 1528-30 (9th Cir.), *cert. denied*, 464 U.S. 1002 (1983); *Signorelli v. Evans*, 637 F.2d 853, 858 (2d Cir. 1980); *Public Citizen, Inc. v. Miller*, 813 F.Supp. 821, 831 (N.D. Ga.); *aff'd Mem.*, 992 F.2d 1548 (11th Cir. 1993). Indeed, other decisions of this Court are consistent with that. See *Bond v. Floyd*, 385 U.S. 116, 135-36 n. 13 (1966); *Davis v. Adams*, 400 U.S. 1203, 1204 (1970) (Black., J. Cir. Justice).

⁷ "The qualifications of the persons who may choose or be chosen . . . are defined and fixed in the Constitution, and are unalterable by the Legislature." *Id.* at 539, quoting the *Federalist Papers*, 371 (Mentor ed. 1961) "[t]he qualifications of the elected . . . have been very properly considered and regulated by the [Constitutional] Convention." *Id.* at 540 n. 74 quoting the *Federalist Papers*, 326 (Mentor ed. 1961).

The Arkansas Supreme Court decision is not inconsistent with this Court's decision in *Clements v. Fashing*, 457 U.S. 957 (1982). In *Clements*, this Court recognized a state's valid interest in requiring certain state officials to resign from state office before they may run for higher state or federal office. A state, like any employer, may say "while you work here, concentrate on this job." *Clements* did not involve a qualification for federal office, but a regulation governing the conduct of state offices.

The Arkansas Supreme Court's decision is equally consistent with *Storer v. Brown*, 415 U.S. 724 (1974) and other ballot access decisions of this Court upholding state ballot access laws under the time, place and manner clause of Article I, Section 4 of the Constitution.⁸ Each of those cases involved only a temporary restriction or a procedural safeguard aimed at an orderly election process. None of the laws at issue permanently prohibited an otherwise qualified individual from being certified as a candidate or from appearing on a ballot for the office of U.S. Senator or Representative. Petitioner's contention that Section 3 of Amendment 73 is valid because it allows incumbents to run for office as write in candidates is totally inconsistent with this Court's holding that an opportunity to cast write in votes "is not an adequate substitute for having the candidate's name appear on the printed ballot." *Anderson v. Celebrezze*, 460 U.S. 780, 799 n. 26 (1983); *Burdick v. Takushi*, 112 S.Ct. 2059, 2065 n. 7 (1992); *Lubin v. Panish*, 415 U.S. 709, 719 n. 5 (1974).

⁸ *Burdick v. Takushi*, 112 S.Ct. 2059 (1992); *American Party of Texas v. White*, 415 U.S. 767 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971).

III. THIS COURT SHOULD AWAIT FURTHER DECISIONS IN OTHER STATE AND LOWER FEDERAL COURTS BEFORE TAKING UP THE CONSTITUTIONALITY OF STATE IMPOSED TERM LIMITS FOR FEDERAL OFFICE HOLDERS

As noted earlier, every court that has reached the merits of the issue has determined that states may not constitutionally impose term limits on federal office holders, either expressly or disguised as a ballot access measure. The issue is now before other state and lower federal courts.⁹

This Court will therefore have additional opportunities to consider the issues. The opinions and analysis of those courts may be of assistance to this Court in refining the exact issues that merit review. And if there remains a unanimous consensus in the state and lower federal courts, this Court may conclude that its review is not required.

There is a particular reason why the Arkansas initiative does not present a good case for this Court's review: it imposes a *lifetime* bar. A law making past service in congress a permanent taint is, we respectfully suggest, even more obviously unconstitutional than a law (like the Washington law now under review in the Ninth Circuit)

⁹ *Duggan v. Beerman* (oral arguments have already been held in the matter before the Nebraska Supreme Court); *Thorsted v. Gregoire*, 841 F.Supp. 1068 (W.D. Wash. 1994) (district court's decision has been appealed to the Ninth Circuit and briefing is anticipated to be completed this summer); *Plante v. Smith*, Case No. 92-CV-40410 (U.S.D.C. N.D. Fla.) (preliminary motions pending).

that merely bars *incumbents* from the ballot. For example, all arguments about the need to deal with the effects and advantages of incumbency lose their force. This is therefore not a good case for the Court to consider the constitutionality of merely hobbling incumbents.

Finally, the State of Arkansas has indicated its intention to file a Petition for Writ of Certiorari in this matter, but is not required and does not intend to do so until near the end of the 90 day period (June 13, 1994). Accordingly, in the alternative, this Court should decline to decide this Petition at this time.

◆

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

U.S. TERM LIMITS, INC., *et al.*,
v. *Petitioners,*

RAY THORNTON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Arkansas

BRIEF FOR THE STATE RESPONDENT

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QUESTION PRESENTED

Amendment 73 to the Arkansas Constitution restricts access to the ballot for certain incumbent candidates for the offices of United States Representative and Senator. Amendment 73 provides that a person who has been elected to three or more terms as a member of the United States House of Representatives, or to two or more terms as a member of the United States Senate, cannot thereafter have his or her name placed on the ballot for that office, although a candidate may still be elected through a write-in campaign. The question presented by this case is the following:

Whether a state has the power under the Elections Clause of the Constitution, Art. I, § 4, Cl. 1, to restrict an incumbent candidate's access to the ballot in such a manner, or whether the Qualifications Clauses of the Constitution, Art. I, § 2, Cl. 2, and § 3, Cl. 3, prohibit a state from imposing such a ballot access restriction.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1456

U.S. TERM LIMITS, INC., *et al.*,
Petitioners,

v.

RAY THORNTON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Arkansas

BRIEF FOR THE STATE RESPONDENT

This case involves the constitutionality of a state election law restricting access to the ballot. As relevant here, Amendment 73 to the Arkansas Constitution provides that a person who has been elected to three or more terms as a member of the United States House of Representatives, or to two or more terms as a member of the United States Senate, cannot thereafter have his or her name placed on the ballot for that office, although a candidate may still be elected through a write-in campaign. Amendment 73 rests on the belief, as stated in its preamble, that "elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people." The Amend-

ment was designed to rectify the deleterious effects of "[e]ntrenched incumbency," which have included "reduced voter participation" and "an electoral system that is less free, less competitive, and less representative" than the one adopted by the Framers. The question presented by this case is whether a state has the power under the Elections Clause of the Constitution, Art. I, § 4, Cl. 1, to remedy those ills through Amendment 73, or whether the Qualifications Clauses of the Constitution, Art. I, § 2, Cl. 2, and § 3, Cl. 3, prohibit Arkansas from pursuing such corrective action.

The Attorney General of Arkansas, on behalf of the State of Arkansas, has filed a petition for a writ of certiorari, No. 93-1828 (filed May 16, 1994), seeking review of the judgment of the Supreme Court of Arkansas in this case. For the reasons given in that petition, the judgment below warrants review by this Court. If the Court grants the petition in this case, it should also grant the petition in No. 93-1828. In fact, because only the State of Arkansas has standing under Article III to defend the constitutionality of one of its laws, *Diamond v. Charles*, 476 U.S. 54, 64-71 (1986), the Court either should grant only the petition in No. 93-1828 or should grant both petitions and consolidate them.

Respectfully submitted,

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May 1994

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

U.S. TERM LIMITS, INC., *et al.*,
Petitioners,

v.

RAY THORNTON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Arkansas

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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TABLE OF AUTHORITIES

Cases:

	Page
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	3
<i>Arkansas ex rel. Bryant v. Hill</i> , No. 93-1828	3
<i>Clements v. Fashing</i> , 457 U.S. 957 (1982)	2
<i>Hopfmann v. Connolly</i> , 746 F.2d 97 (1st Cir. 1984), <i>vacated in part</i> , 471 U.S. 459 (1985)	2
<i>Jenness v. Fortson</i> , 403 U.S. 431 (1971)	3
<i>Joyner v. Mofford</i> , 706 F.2d 1523 (9th Cir.), <i>cert. denied</i> , 464 U.S. 1002 (1983)	2
<i>Lubin v. Panish</i> , 415 U.S. 709 (1974)	3
<i>Maine v. Taylor</i> , 477 U.S. 131 (1986)	3
<i>Public Citizen, Inc. v. Miller</i> , 992 F.2d 1548 (11th Cir. 1993)	2
<i>Roudebush v. Hartke</i> , 405 U.S. 15 (1972)	1
<i>Smiley v. Holm</i> , 285 U.S. 355 (1932)	2
<i>Stack v. Adams</i> , 315 F. Supp. 1295 (N.D. Fla. 1970)	2
<i>State ex rel. McCarthy v. Moore</i> , 87 Minn. 308, 92 N.W. 4 (1902)	2
<i>State ex rel. O'Sullivan v. Swanson</i> , 127 Neb. 806, 257 N.W. 255 (1934)	2
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	1, 3
<i>Tashjian v. Republican Party</i> , 479 U.S. 208 (1986)	1
<i>Yniguez v. Arizona</i> , 939 F.2d 727 (9th Cir. 1991) ..	3

Constitutional Provisions:

U.S. Constitution, Article I	1, 2
Fourteenth Amendment	2, 3

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1456

U.S. TERM LIMITS, INC., *et al.*,
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On Petition for a Writ of Certiorari to the
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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

1. Respondents do not attempt to deny the national importance of the issue raised.

2. In *Storer v. Brown*, 415 U.S. 724 (1974), this Court held that the claim that Article I prohibited a state law barring from the ballot a defined group of candidates was "wholly without merit." 415 U.S. at 746 n.16. Respondents acknowledge *Storer*, and say it was correctly decided as a state regulation under Article I, § 4. Br. Opp. 14. They are unable to distinguish it, except to argue that state power granted by Article I, § 4, should be limited to laws they call "procedural" or "temporary." Br. Opp. 14. But this Court has held often that Article I, § 4, is very broad, and has never suggested any such limitation. See, e.g., *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986); *Roudebush v. Hartke*, 405 U.S. 15, 24-25 (1972) ("[i]t cannot be doubted that these comprehensive words embrace authority to provide a com-

plete code for congressional elections," quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

3. Respondents also acknowledge *Clements v. Fashing*, 457 U.S. 957 (1982), in which this Court upheld under the Fourteenth Amendment a state bar on judges running for Congress. Respondents say that that law was an appropriate state regulation of office-holders. Br. Opp. 14. But if, as the Supreme Court of Arkansas here holds, Article I by unstated implication bars states from adding qualifications for Congress, then *Clements v. Fashing* must be incorrect under Article I.

4. Respondents cannot deny that decisions of other state supreme courts and of federal courts of appeals have repeatedly held that if, as here, a candidate is allowed to run for election by write-in, then no qualification in the sense of Article I has been added. *Public Citizen, Inc. v. Miller*, 992 F.2d 1548 (11th Cir. 1993); *Joyner v. Moford*, 706 F.2d 1523, 1531 (9th Cir.), cert. denied, 464 U.S. 1002 (1983); *Hopfmann v. Connolly*, 746 F.2d 97, 103 (1st Cir. 1984), vacated in part on other grounds, 471 U.S. 459 (1985); *State ex rel. O'Sullivan v. Swanson*, 127 Neb. 806, 808-10, 257 N.W. 255, 255-56 (1934); *State ex rel. McCarthy v. Moore*, 87 Minn. 308, 92 N.W. 4 (1902); accord, *Stack v. Adams*, 315 F. Supp. 1295, 1298 (N.D. Fla. 1970) (three-judge court).

The holding of the Arkansas court here is to the contrary. Respondents seek to distinguish all the prior cases on the theory that, although each denied ballot access to one group of candidates or another, none did so on the basis of long incumbency. Br. Opp. 11-12. That proposed distinction, wholly contrary to the reasoning of those cases, amounts to an argument for affirmance on the merits, and is not a reason for denying certiorari.

5. In weighing state election laws for compliance with the Fourteenth Amendment, this Court has frequently held that the availability of election by write-in is a constitutionally sufficient alternative to appearing on a

printed ballot. E.g., *Storer v. Brown*, supra, 415 U.S. at 736 n.7; *Jenness v. Fortson*, 403 U.S. 431, 434, 438 (1971). In other situations, as when a state effectively bars new political parties or persons without wealth from the ballot, this Court has held that the restriction is too acute for the write-in alternative to satisfy the Fourteenth Amendment. E.g., *Anderson v. Celebrezze*, 460 U.S. 780, 799 n.26 (1983); *Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974); but see *id.* at 722 (Blackmun and Rehnquist, JJ., concurring). To the extent any need to harmonize those Fourteenth Amendment decisions is perceived, that in itself supports granting certiorari.

CONCLUSION

For the reasons stated herein and in the petition, certiorari should be granted.*

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June 6, 1994

* Petitioners, who were intervenor defendants below, are the official sponsor and other supporters of the Arkansas law, which was enacted by initiative and not by elected state officials. The attorney general of Arkansas has filed a responding brief seven days out of time which suggests that petitioners' standing depends on the presence of the state; that is incorrect, see, e.g., *Maine v. Taylor*, 477 U.S. 131, 136-37 (1986); *Yniguez v. Arizona*, 939 F.2d 727, 731-33 (9th Cir. 1991); it is also irrelevant, given that the state by the attorney general is also a petitioner, in No. 93-1828.

6 5
Nos. 93-1456 and 93-1828

Supreme Court, U.S.

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IN THE
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OCTOBER TERM, 1994

U.S. TERM LIMITS, INC., *et al.*,
v. *Petitioners,*

RAY THORNTON, *et al.*,
Respondents.

WINSTON BRYANT,
ATTORNEY GENERAL OF ARKANSAS,
v. *Petitioner,*

BOBBIE E. HILL, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of Arkansas

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PETITIONS FOR CERTIORARI FILED MARCH 17, 1994
AND MAY 16, 1994
CERTIORARI GRANTED JUNE 20, 1994

216 MP

TABLE OF CONTENTS

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	Page
Docket entries, Pulaski County Circuit Court, Second Division	1
Docket entries, United States District Court for the Eastern District of Arkansas	18
Docket entries, Supreme Court of Arkansas	25
Complaint (Nov. 13, 1992)	41
Answer of Congressman Ray Thornton (Jan. 19, 1993)	53
Motion To Intervene of State <i>ex rel.</i> Attorney General Winston Bryant (Jan. 22, 1993)	57
Answer of State <i>ex rel.</i> Attorney General (Jan. 22, 1993)	59
Answer of George O. Jernigan, Jr., and Democratic Party of Arkansas (Jan. 25, 1993)	61
Answer of Blanche Lambert (Jan. 25, 1993)	66
Amended Answer of State <i>ex rel.</i> Attorney General (Jan. 25, 1993)	68
Answer of Tim Hutchinson, Asa Hutchinson, and Republican Party of Arkansas (Jan. 25, 1993)	70
Motion To Intervene of Arkansans for Governmental Reform, Inc., <i>et al.</i> (Jan. 26, 1993)	72
Answer of Intervenors Arkansans for Governmental Reform, Inc., <i>et al.</i> (Jan. 26, 1993)	74
Answer of Congressman Jay Dickey (Feb. 1, 1993)	76
Response of Plaintiff to Motion To Dismiss of Jim Guy Tucker (Feb. 18, 1993)	79
Order Permitting Intervention of State <i>ex rel.</i> Attorney General (Feb. 10, 1993)	82
Answer of Senator David Pryor (Feb. 19, 1993)	84
Answer of Senator Dale Bumpers (Feb. 23, 1993)	87
Order Authorizing Intervention of Arkansans for Governmental Reform, Inc., <i>et al.</i> (Feb. 24, 1993)	90
Motion To Intervene of Americans for Term Limits and Steve Goss (Feb. 24, 1993)	91

TABLE OF CONTENTS—Continued

	Page
Answer of Intervenor Americans for Term Limits and Steve Goss (Feb. 24, 1993)	93
Notice of Removal (March 4, 1993)	95
Motion To Intervene of U.S. Term Limits Inc., <i>et al.</i> (March 26, 1993)	100
Affidavit of Jeffrey E. Langan (March 26, 1993) ..	101
Answer of Intervenor U.S. Term Limits, Inc., <i>et al.</i> (March 26, 1993)	104
Order of Remand (April 28, 1993)	107
Amended Complaint (June 2, 1993)	108
Answer to Amended Complaint and Cross-Complaint of George O. Jernigan and Democratic Party of Arkansas (June 18, 1993)	121
Answer of Arkansans for Governmental Reform, Inc. to Amended Complaint (June 18, 1993)	126
Answer of U.S. Term Limits, Inc., <i>et al.</i> , to Amended Complaint (June 18, 1993)	129
Answer of State <i>ex rel.</i> Attorney General to Amended Complaint (June 18, 1993)	133
Answer and Cross-Complaint of Ray Thornton to Amended Complaint (June 18, 1993)	136
Answer of Blanche Lambert to Amended Complaint (June 18, 1993)	142
Answer of Republican Party of Arkansas, Asa Hutchinson and Tim Hutchinson to Amended Complaint (June 18, 1993)	145
Order (Granting Intervention and Setting Schedule) (June 22, 1993)	147
Answer of Republican Party of Arkansas, Asa Hutchinson and Tim Hutchinson to Cross-Complaint (June 30, 1993)	149
Motion for Summary Judgment of U.S. Term Limits, Inc. (July 9, 1993)	150

TABLE OF CONTENTS—Continued

	Page
Motion for Summary Judgment of Plaintiffs (July 9, 1993)	152
Affidavit of Bobbie E. Hill (July 7, 1993)	154
Affidavit of Dick Herget (July 7, 1993)	156
Text of Amendment 73	158
Affidavit of Congressman Ray Thornton (July 9, 1993)	163
Election data: 1992 Initiative	164
Motion for Partial Summary Judgment of Ray Thornton (July 9, 1993)	167
Exhibits to Response of U.S. Term Limits, Inc., <i>et al.</i> , to Plaintiffs' Motion for Summary Judgment (July 23, 1993)	169
Election data: Thomas Dale Alford	169
Election data: James Strom Thurmond	172
Election data: Joseph Richard Skeen	175
Election data: Ron Packard	177
Letter on Behalf of Senator Dale Bumpers (July 27, 1993)	178
Conclusions of Law (July 29, 1993)	P.C.A. 45a
Transcript of Proceedings (Sept. 7, 1993)	181
Findings of Fact, Conclusions of Law and Final Order (Sept. 8, 1993)	P.C.A. 53a
Notice of Appeal of U.S. Term Limits, Inc., <i>et al.</i> (Sept. 14, 1993)	182
Notice of Appeal of Republican Party of Arkansas, Asa Hutchinson and Tim Hutchinson (Sept. 30, 1993)	184
Notice of Appeal of Americans for Term Limits and Steve Goss (Oct. 7, 1993)	185
Notice of Cross-Appeal (Oct. 7, 1993)	187
Notice of Appeal of George O. Jernigan, Jr. and Democratic Party of Arkansas (Oct. 8, 1993)	188

TABLE OF CONTENTS—Continued

	Page
Notice of Appeal of Arkansans for Governmental Reform, Inc. (Oct. 8, 1993)	190
Notice of Appeal of U.S. Term Limits, Inc., <i>et al.</i> (Oct. 25, 1993)	191
Notice of Appeal of State <i>ex rel.</i> Attorney General (Oct. 26, 1993)	193
Exhibits to Reply Brief of U.S. Term Limits, Inc., <i>et al.</i> (Feb. 7, 1994)	194
Massachusetts Res. of Nov. 19, 1788	194
Virginia Act of Nov. 20, 1788	194
New Jersey Act of Nov. 21, 1788	194
Maryland Act of Dec. 22, 1788	196
Georgia Act of Jan. 23, 1789	197
North Carolina Act of Dec. 16, 1789	198
Virginia Act of Dec. 26, 1792	198
Tennessee Act of Aug. 3, 1796	199
Affidavit of James S. Fay (Feb. 6, 1994)	200
Motion for Leave To File Exhibits (Feb. 8, 1994)	205
Order Granting Motions To Supplement Record and File Exhibits (Feb. 14, 1994)	206
Opinion and Judgment of Supreme Court of Arkansas (March 7, 1994)	P.C.A. 1a
Orders Denying Rehearing (March 14, 1994)	207
Order Allowing Certiorari (No. 93-1456) (June 20, 1994)	208
Order Allowing Certiorari (No. 93-1828) (June 20, 1994)	209

NOTICE

The following opinions have been omitted in printing this appendix because they appear on the following pages in the printed appendix to the petition for certiorari in No. 93-1456, which is incorporated herein by reference:

Item	Page in Appendix to Petition for Certiorari in No. 93-1456
Opinion of the Circuit Court of Pulaski County, Arkansas, July 29, 1993	45a
Opinion of the Circuit Court of Pulaski County, Arkansas, September 8, 1993	53a
Opinion of the Supreme Court of Arkansas, March 7, 1994	1a

Certificates of service whenever appended to documents appearing herein have been omitted in printing.

PULASKI COUNTY CIRCUIT CLERK'S OFFICE
CIVIL DIVISION

Docket No. 92-6171

BOBBIE E. HILL, *et al.*

v.

BILL CLINTON, *et al.*

DOCKET ENTRIES

DATE	PROCEEDINGS
11/13/92	HILL BOBBIE E. LEAGUE OF WOMEN VOTERS OF AR vs. CLINTON, BILL; TUCKER, JIM GUY; BRYANT, WINSTON; McCUEN, W J "BILL"; FISHER, JIMMIE LOU; JONES, JULIA HUGHES; DANIELS, CHARLIE; AR CONGRESSIONAL DELEGATION & MEMBERS; AR SENATE & MEMBERS; AR HOUSE OF REP & MEMBERS; REPUBLICAN PARTY OF AR; DEMOCRATIC PARTY OF AR; CLINTON, BILL; TUCKER, JIM GUY; BRYANT, WINSTON; McCUEN, W J BILL; FISHER, JIMMIE LOU; JONES JULIA HUGHES; DANIELS, CHARLIE; RIABLE, MARK; HUTCHINSON, TIM; DICKEY, JAY; THORNTON, RAY; JERNIGAN, GEORGE; LAMBERT, BLANCHE; BUMPERS, DALE; PRYOR, DAVID; WALTERS, BILL; LANE, JAMES F; AR FOR GOVERNMENTAL RE- FORM INC; COOK, LAWRENCE; JACOB, TIMOTHY; MUNN, STEVE; EPPERSON, TIM; CURTIS, LANCE; KING, MILES; JAMISON, DAVID; MENDENHALL, SY; ULERY, TERESA; PETTY, EUAL; MUNN, TOMMY; WHITE,

DATE	PROCEEDINGS
	JIMMY; McCOLLUM, DR BILL; TRUBEY, RICHARD; PERRY, LEON; BURKS, BRUCE; STUDDARD, HOWARD; CROW, J D; OLLAR, CLAUDIE RAY; TUCKER, GOVERNOR JIM GUY; BRYANT, ATTY GENERAL WINSTON; McCUEN, SEC OF STATE BILL; FISHER, TREASURER JIMMIE LOU; JONES, AUDITOR JULIA HUGHES; DANIELS, LAND COMM CHARLIE; U S TERM LIMITS INC; AR CONGRESSIONAL DELEGATION MEMBERS: BUMPERS, DALE; PRYOR, DAVID; ALEXANDER, BILL; THORNTON, RAY; ANTHONY, BERYL; HAMMERSCHMIDT, JOHN PAUL; LAMBERT, BLANCHE; HUTCHINSON, TIM; DICKEY, JAY; AR SENATE MEMBERS: SCOTT, JAMES C "JIM"; MOORE, JR, W D "BILL"; ROSS, MIKE; DOWD, WAYNE; CASSADY, NEELY; HOPKINS, GEORGE; EDWARDS, JEAN C; BRADFORD, JAY; WALTERS, BILL; MILES, TRAVIS A; HARDIN, LU; CANADA, EUGENE "BUD"; CHAFFIN, CHARLIE COLE; SNYDER, VIC; JEWELL, JERRY D; HOOFFMAN, CLIFF; RUSS, STANLEY; BEEBE, MIKE; LEWELLEN, ROY C "BILL"; EVERETT, MIKE; BELL, STEVE; GORDON, ALLEN; FITCH, JON S; HARRIMAN, MORRIL; BEARDEN, MIKE; BOOKOUT, JERRY; TODD, MIKE; WILSON, NICK; LUELF, STEVE; YATES, JOE E; MALONE, DAVID R; BELL, CLARENCE GIBSON, JACK ANDERSON; HOWELL, MAX; PAGAN, JOHN; SMITH, KEVIN; KEET, JIM; GWATNEY, BILL; HOLIMAN, REID AR HOUSE OF REPRESENTATIVES & MEMBERS; STEELE, RAILEY A; HINSHAW, JERRY E; McJUNKIN, LOUIS; STEWARD, CHARLES W; FAIRCHILD, BOB; HUNTON, JERRY; THICKSTEN, EDWARD F; HENDRIX, B G; POLLAN, CAROLYN; BLAIR, JR, RALPH "BUDDY"; KING, JERRY D; RICE, W R "BUD"; MADDOX, ODE; WING

DATE	PROCEEDINGS
	FIELD, GUS; HORN, HOYE D; BEATTY, DAVID; CARTER, ARTHUR; WHORTON, JR CHARLES; WILLEMS, FRANK K; GEORGE, LLOYD R; WOOD, KEITH; WATTS, BOB J; BRYAN, L L "DOC"; HAWKINS, BRUCE; MULLENIX, TED E; ALLEN, JAMES C; PARKERSON, JOHN W; ARNOLD, BOB "SODY"; SMITH, JUDY; DAWSON, JOHN H; PURDOM, BILLY JOE; RORIE, ROGER L; THURMAN, RANDY; SANSON, W H "BILL"; STEPHENS, BILL; MITCHELL, LARRY; LANDERS, H LACY; EASLEY, VEO; NEWMAN, BOBBY G; MAHONY, JODIE; WYRICK, PHIL; JONES, MYRA; ARGUE, JR, JIM; WALKER, JR, WILLIAM L "BILL"; PRYOR, MARK; BROWN, IRMA HUNTER; HENRY, CAROL "COACH"; DIETZ, JAMES G; WOOD, DOUG; WILSON, MIKE; TOWNSEND, WILLIAM H; GOODWIN, LARRY; MILLER, JOHN E; CAPPS, JOHN PAUL; MILLER, J STRUGIS; WILKINS, JOSETTA E; ROBERTS, JACQUELINE J; SCHEXNAYDER, CHARLOTTE; McKISSACK, JIMMIE DON; DAVIS, MICHAEL K; BAKER, THOMAS G; COLLIER, ALBERT "TOM"; CALHOUN, V O "BUTCH"; NORTHCUTT, WANDA; JORDAN, JAMES T; MURPHY, N B "NAP"; HOLLAND, JIM; WOOLDRIDGE, TIM; WOOD, BOBBY G; HOGUE, BOBBY L; MILLER, OWEN; SHAVER, J L "JIM"; FLANAGIN, PAT; WAGNER, WAYNE; DAY, WALTER M; BROWNLEE, CHRISTENE; McGEE, BEN; McCUISTAN, JR, LLOYD C; McGINNIS, BOB; CUNNINGHAM, ERNEST; WILSON, JIMMIE L; GIBSON, BYNUM; HUTCHINSON, TIM; GILBERT, JAMES EDWARD "ED"; BARCLAY, RICHARD L "DICK"; PORTER, BILL D; MITCHUM, TOMMY E; ROBERTS, JAMES H "JIM"; MILLS, WILLIAM P "BILL"; TEAGUE ROBERT VAUGHN "BOB"; ROBERTS, DAVID E; GIVENS JR, ARTHUR "ART"; McCOY,

DATE	PROCEEDINGS
	JACK H; TULLIS, ROBERT WAYNE "BOBBY"; LIPTON, JOHN M; TURNER, G W "BUDDY"; FORGEY, TOM; DOWD, TRAVIS; MORELAND, DANA A; VON, GREMP JIM; BISBEE, DAVE; BRYANT, RANDY; HALL, JOHN; HILL, JIM; YOUNG, DENNIS; CURRAN, ARMIL O; WALLIS, D R "BUDDY"; SHEID, VADA; WREN, GREG; STALNAKER, E RAY; RIABLE, MARK; BENNETT, DEE; MOLINARO, JOE; CHOATE, DAVID; FLETCHER, BILL; OWENS, MARIAN D; CASH, CLAUDE V; JERNIGAN JR, GEORGE O; HUTCHINSON, ASA; BINNS, LULA; McFARLIN, SHIRLEY; BIFFORD, RICHARD; JOHNSON, BONNIE; AMERICANS FOR TERM LIMITS; STEVE GOSS.
12/03/92	Answer Filed WALTERS BILL
12/08/92	MOTION FILED PLF FOR EXT OF TIME FOR DEFS TO ANS COMPL
12/09/92	Order GRANTING DEF EXT TIME RESP COMPL 12-15-92 - 2-92-1386
12/09/92	Answer and Claim AR SENATE & MEMBERS VS B CLINTON JIM GUY WINSTON BRYANT BILL MCCUEN J FISHER JULIA JONES C DANIELS
12/09/92	Answer and Claim AR HOUSE OF REP & MEMBERS VS B CLINTON J GUY TUCKER W BRYANT BILL MCCUEN J FISHER JULIA JONES C DANIELS
12/10/92	Order ORD ENTERED IS TO APPLY TO MEMBER OF AR GENERAL ASSEMBLY NOT YET RESP TO COMPL 2-92-1390
12/11/92	MOTION FILED DEF CLINTON TO DISMISS AS PARTY IN SUIT
12/11/92	Summons Returned Served RIABLE MARK
12/15/92	Answer Filed AR SENATE & MEMBERS AMD & SUB OF DEC 15

DATE	PROCEEDINGS
12/15/92	Answer Filed AR HOUSE OF REP & MEMBERS AMD & SUB OF DEC 15
12/17/92	Order GRANTING DEFS TUCKER PRYOR BUMPERS BRYANT THORNTON LAMBERT & JERIGAN EXT RESP TO COMPL 1-25-93 2-92-1431
12/18/92	Order GRANTING DEFS EXT TIME RESP TO COMPL 1-25-93 - 2-92-1438
12/29/92	Answer Filed RIABLE MARK
12/29/92	UNIFIED MEMBER RESP TO MOT TO DIS BILL CLINTON AS NAMED DEF
01/19/93	CONGRESSMAN RAY THORNTON ANS TO COMPLAINT
01/22/93	INTV AR EX REL ATTY GEN BRYANT BRIEF IN SUPP OF MOT TO INTERVENE AS DEF
01/22/93	INTV AR EX REL ATTY GEN BRYANT ANS TO COMPL
01/22/93	MOTION FILED STATE AR EX REL ATTY GEN BRYANT TO INTERVENE
01/25/93	MOTION FILED DEF JIM TUCKER TO DIS CRC FOR DECLARATORY JUD
01/25/93	DEF JIM TUCKER BRF IN SUP OF MOT TO DISM CRC
01/25/93	MOTION FILED DEF JIM TUCKER TO DISMISS
01/25/93	DEF JIM TUCKER BRIEF IN SUPP OF MOT TO DIS
01/25/93	INTV AR EX REL BRYANT ATTY GEN AMD ANS TO COM
01/25/93	MOTION FILED INTV AR EX REL BRYANT ATTY GEN TO AMD

DATE	PROCEEDINGS
01/25/93	Answer Filed DEMOCRATIC PARTY OF AR & GEORGE JERNIGAN
01/25/93	Answer Filed REPUBLICAN PARTY OF AR BY TIM & ASA HUTCHINSO
01/25/93	Answer Filed BLANCE LAMBERT US CONGRESSWOMAN ANS TO COMPL
01/25/93	MOTION FILED PLF AGREED ADDITION TIME FOR PRYOR & BUMPERS TO RESP TO COMPL
01/26/93	INTV AR FOR GOVERNMENTAL REFORM INC ANS COMPL
01/26/93	MOTION FILED INTV AR FOR GOVERNMENTAL REFORM INC
02/01/93	CONGRESSMAN JAY DICKEY ANS TO COMPL
02/02/93	Order GRANTING DEF DICKEY ADDTL TIME RESP TO COMPL TO 2-1-93 2-93-124
02/02/93	Order EXT TIME DEF PRYOR & BUMPERS TO RESP TO COMPL 2-25-93 2-93-125
02/05/93	UNIFIED MEMBERS RESP TO MOT TO DISMISS
02/08/93	PLF BRIEF IN OPPOSITION TO MOT TO DIS TUCKER
02/08/93	PLF HILL RESP TO MOT TO DIS DEF TUCKER
02/09/93	Order PERMITTING ATTY GEN WINSTON BRYANT TO INTV 2-93-170
02/11/93	HEARING *SET: 02/25/93 02:30 PM LETTER SENT 12-Feb-93
02/16/93	HEARING *SET: 03/11/93 08:30 AM LETTER SENT 18-Feb-93
02/17/93	DEFENDANT ADDRESS #28 250 STATE CAPITOL BUILDING

DATE	PROCEEDINGS
02/17/93	DEFENDANT ADDRESS #28 LITTLE ROCK, AR 72201
02/19/93	Answer Filed PRYOR DAVID
02/24/93	MOTION FILED AMERICANS FOR TERM LIMITS & STEVE GOSS TO ITV
02/24/93	Answer Filed BUMPERS DALE
02/24/93	Order AUTHORIZING INTERVENTIN [sic] 2-93-214
03/01/93	MOTION FILED UNIFIED MEMBERS FOR PARTIAL SUMM JUDG ON NON-SEVERABILITY
03/01/93	UNIFIED MEMBERS MEMO BRf IN SUP OF MOT S JUD
03/04/93	Case transferred from circuit ALL DEFENDANTS NOTICE OF REMOVAL
03/08/93	DEF DALE BUMPERS MEMO ON LMTD STATUS IN CASE
04/29/93	Case reopened or reinstated ALL DEFENDANTS REMAND FROM US DIST CT
04/30/93	HEARING *SET: 06/08/93 02:00 PM LETTER SENT 30-Apr-93
05/06/93	Additional Defendant Attorney WEB07
05/14/93	STATE OF AR MOT TO EXTEND TIME TO RESP
05/14/93	Order GRANTING INTV EXT OF TIME TO RESP 5-20-93 2-93-510
05/20/93	DEF/INTV RESP & OBJECTION OF MOT OF UNIFIED MEMBERS FOR PARTIAL SUM JUDG & BRIEF IN SUP
05/20/93	MOTION FILED STATES OF AR TO DISM CROSS COMPL OF UNIFIED MEMBERS

DATE	PROCEEDINGS
05/20/93	STATE OF AR BRIEF IN SUPP OF MOT TO DISM CRC
05/20/93	INTERVENORS BRIEF IN SUP OF MOT TO DISMISS CR COMPL OF UNIFIED MEMBERS
05/20/93	INTERVENORS RESP TO UNIFIED MEMBERS MOT FOR PARTIAL SUM JUDG ON NON SEVERABILITY
05/20/93	STATE OF AR BRIEF IN SUPP OF RESP TO MOT FOR PARTIAL SUMM JUD ON NON-SEVERABILITY
05/20/93	MOTION FILED INTERVENORS MOT TO DISM
05/20/93	DEF STATE OF AR BRIEF IN SUPP OF MOT TO DISM
05/20/93	MOTION FILED INTERVENOR STATE OF AR MOT TO DISM CRS CMPLT OF RAY THORNTON & THE DEMO PRY OF AR
05/20/93	INTERVENOR BRIEF IN SUP OF MOT TO DISM CROSS COMPLAINT
05/20/93	INTERVENOR MOT TO DISM CROSS-CLAIM OF JERNIGAN
05/25/93	PLF SUPP RESP IN OPPOSITION TO MOT OF US TERM LIMITS TO INTERVENE
06/02/93	INTERVENOR RESP TO PLF SUPP RESP IN OPPOSIT TO MOT OF DEF US TERM LIMITS TO INTERVENE
06/02/93	Amended Complaint PLF
06/02/93	PLF BOBBIE E HILL RESP TO MOT TO DISM COMPL
06/02/93	PLF BRF IN OPPOSITION TO MOT TO DISMISS

DATE	PROCEEDINGS
06/03/93	DEF/INTERVENORS RESP IN SUPP OF MOT TO DISM & BRIEF IN SUPP
06/07/93	RESP OF RAY THORNTON TO MOT TO DISM CROSS COMPLAINT
06/07/93	DEF GEORGE JERNIGAN JR & DEMOCRATIC PARTY RESP TO MOT TO DIS CRC
06/08/93	DEF/CR CL G JERNIGAN & DEMO PTY BRF IN SUP OF RESP TO MOT TO DISMISS
06/08/93	STIPULATION FOR SUBS OF COUSEL FOR DEF RAY THORNTON BY ATTY MITCHELL WILLIAMS SELIG GATES & WOODARD
06/09/93	HEARING *SET: 09/08/93 08:30 AM LETTER SENT 16-Jun-93
06/09/93	HEARING *SET: 07/29/93 01:30 PM LETTER SENT 16-Jun-93
06/10/93	Additional Defendant Attorney HAR02
06/10/93	Additional Defendant Attorney HAR65
06/10/93	Additional Defendant Attorney GAR15
06/10/93	Additional Defendant Attorney WEB07
06/10/93	Additional Defendant Attorney BEL07
06/10/93	Additional Defendant Attorney ALL03
06/10/93	Additional Defendant Attorney WOO03
06/16/93	Answer and Claim UNIFIED MEMBERS HOUSE & SENATE & CLAIM FOR DECLARATORY JUD
06/18/93	Answer and Claim JERNIGAN JR GEORGE O VS GOV JIM GUT TUCKER ATTY GEN WINSTON BRYANT SEC OF STATE BILL MCCUEN TRES JIMMIE LOU FISHER AUDITOR JULIA HUGHES JONES LAND COMM CHARLIE DANIEL

DATE	PROCEEDINGS
06/18/93	Answer and Claim DEMOCRATIC PARTY VS SAME AS ABOVE
06/18/93	Answer Filed BRYANT WINSTON TO AMD
06/18/93	Answer and Claim THORNTON RAY
06/18/93	Answer Filed LAMBERT BLANCHE TO AMD
06/18/93	Intervenor filed AMERICANS FOR TERM LIMITS
06/18/93	Intervenor filed GOSS STEVE
06/18/93	Answer Filed AR FOR GOVERNMENTAL REFORM INC TO AMD
06/18/93	Answer Filed PRYOR DAVID TO AMD
06/18/93	Answer Filed REPUBLICAN PARTY OF AR TO AMD
06/18/93	Answer Filed HUTCHINSON TIM TO AMD
06/18/93	MOTION FILED AR FOR GOVERNMENTAL REFORM TO DISMISS AMD & CR COMPL & BRF IN SUP OF
06/18/93	Answer Filed US TERM LIMITS INC TO AMD
06/22/93	Order US TERM LIMITS GILBERT RICE SCHULTZ PLUMLEY AMER FOR TERM LIMITS GOSS MOTS TO INTERVENE GRANTED 2-93-610
06/24/93	Answer Filed DEF DAVID PRYOR TO CROSS COMPLT
06/24/93	Answer to Claim PLF REPLY TO CCL OF AMER TERM LIMITS & GOSS
06/24/93	Answer Filed PRYOR DAVID TO AMD COMPLAINT
06/30/93	Answer to Claim THORNTON RAY TO AMD CROSS COMP
06/30/93	Answer to Claim JERNIGAN GEORGE O TO AMD CROSS COMP

DATE	PROCEEDINGS
06/30/93	Answer to Claim DEMOCRATIC PARTY OF AR TO AMD CROSS COMP
06/30/93	Answer to Claim REPUBLICAN PARTY OF AR TO CROSS COMP
06/30/93	Answer to Claim UNIFIED MEMBERS REPLY TO AMER TERM LIMITS CCL
07/01/93	PLF RESP & BRF IN OPPOSITION TO MOT TO DISM AMD COMPL
07/02/93	DEF JERNIGAN & DEMO PTY BRF IN SUP OF RESP TO DISM CR CL
07/02/93	DEF JERNIGAN & DEMO PTY RESP TO MOT TO DISM CR CL
07/09/93	MOTION FILED PLF FOR SUMM JUD
07/09/93	MOTION FILED PLF FOR SUMM JUD
07/09/93	MOTION FILED INTERVENOR STATE OF AR/BRYANT TO DISM CR CL OF UNIFIED MEMBERS TO AND COMPL
07/09/93	MOTION FILED INTERVENOR MOT TO DISM AMD COMPLAINT
07/09/93	THORNTON MOT FOR PARTIAL SUMMARY JUDG
07/09/93	PLF BRIEF IN SUPP OF MOT FOR SUMM JUDG
07/09/93	MOTION FILED DEF US TERM LIMITS MOT FOR SUMM JUDGMENT
07/09/93	DEF US TERM LIMITS BRF IN SUPP OF MOT FOR SUMM JUDGMENT
07/09/93	MOTION FILED CROSS CLAIMANT GEORGE JERNIGAN & THE DEMOCRATIC PARTY FOR SUMM JUD
07/09/93	MOTION FILED STATE OF AR TO DISM CCL OF DEF RAY THORTON TO AMD COMPL

DATE	PROCEEDINGS
07/09/93	MOTION FILED STATE OF AR TO DISM CR CL OF DEF JERNIGAN & DEMO PTY CL
07/09/93	MOTION FILED ST OF AR MOT TO DISM ALL DEF
07/14/93	MOTION FILED INTV WINSTON BRYANT FOR CT TO SET TIME FOR RESP TO MOTS FOR SUMM JUD
07/14/93	Order SETTING TIME FOR RESP TO MOT FOR SUMM JUD 7-28-93 2-93-684
07/16/93	NOT OF DEPO TO SHERRY BARTLEY STEVE ENGSTROM ELIZABETH ROBBEN & STUART JACKSON
07/19/93	MOTION FILED DEF/INTERVENOR FOR ADMISSION PRO HAC VICE
07/20/93	MOTION FILED PLF FOR PROTECTIVE ORD
07/20/93	PLF BRF IN SUP OF MOT FOR PROTECTIVE ORD
07/21/93	MOTION FILED RAY THORNTON FOR PROTECTIVE ORD
07/21/93	RAY THORNTON BRIEF IN SUPP OF PROTECTIVE ORD
07/22/93	MOTION FILED DEF JERNIGAN FOR PROTECTIVE ORD
07/22/93	GEO JERNIGAN BRIEF IN SUPP OF MOT FOR PROT OR
07/23/93	PLF BRF IN OPPOSITION TO MOT TO DISM UNNAMES CITIZENS LEAGUE OF WOMEN & ALL DEF NAMED IN AMD COMPL
07/23/93	PLF RESP IN OPPOSITION TO MOT TO DISMISS UNNAMED CITIZENS LEAGUE OF WOMEN & ALL DEF NAMED IN AMD COMPL

DATE	PROCEEDINGS
07/23/93	PLF RESP IN OPPOSITION TO MOT TO DISM AMD
07/23/93	PLF BRF IN OPPOSITION TO MOT TO DISM AMD
07/23/93	PLF RESP IN OPPOSITION TO US TERM MOT FOR SUM JUDG UNDER COUNTS 1-4 OF AMD COMPL
07/23/93	PLF BRF IN OPPOSITION TO US TERM MOT FOR SUM SUM JUDG UNDER COUNTS 1-4 OF AMD COMPL
07/23/93	DEF US TERM LIMITS RESP TO PLF MOT FOR SUMJUD
07/23/93	DEF US TERM LIMITS RESP TO DEF/CR CL THORNTON MOT FOR PART SUM JUD
07/23/93	DEF US TERM LIMITS RESP TO MOT FOR SUM JUG OF G JERNIGAN & DEMOCRATIC PARTY
07/23/93	Answer Filed DEMOCRATIC PARTY TO CCL OF AMER FOR TERM
07/23/93	Answer Filed JERNIGAN ANS TO CCL OF AMER FOR TERM LIMITS & STEVE GOSS
07/26/93	G JERNIGAN & DEMO PTY RESP TO MOT TO DIMS CR CL & MOT TO DISM ALL DEF NAMED IN AMD COMPL
07/26/93	G JERNIGAN & DEMO PTY BRF IN SUP OF RESP TO MOT TO DISM CR CL & DISM ALL DEF IN AMD
07/26/93	MOTION FILED C D MITCHELL FOR ADMISSION PRO HAC VICE
07/27/93	MOTION FILED STATE OF AR ATTY GENERAL WINSTON BRYANT TO REALIGN THE PARTIES TO ESTABLISH PROCEDURAL GUIDELINES & MAKE FINDINGS ON PENDING MOT

DATE	PROCEEDINGS
07/27/93	Order DEPO NOT BY DEF INTERV AR FOR GOV SHALL NOT BE HAD BY 7-23-93 PARTIES DIRECTED TO CONFER 2-93-722
07/28/93	LETTER TO CLERK FROM ATTY FOR DALE BUMPERS REGARDING ANSWERING AMENDED COMPLAINTS
07/28/93	UNIFIED MEMBERS RESP TO MOT TO DISM CROSS CLM
07/28/93	Cross Complaint filed UNIFIED MEMBERS 1ST AMENDED CROSS CLAIM
07/28/93	U S TERM LIMITS INC ET AL REPLY MEMO IN SUPP OF MOT FOR SUMM JUD
07/28/93	THORNTON RESP TO MOT TO DIS CROSS-CLAIM TO AMD COMPL
07/28/93	DEF DEMO & JERNIGAN BENCH MEMOI REGARDING 1ST AMD ISSUES
07/28/93	STATE OF AR RESP TO MOT FOR SUMM JUD BY GEO JERNIGAN & DEMOCRATIC PARTY & BRIEF IN SUPP
07/28/93	STATE OF AR RESP TO MOT FOR SUMM JUD BY RAY
07/28/93	PLF REPLY TO RSP OF US TERM TO PLF MOT SUMMJU THORNTON & BRIEF IN SUPP
07/28/93	STATE OF AR RESP TO MOT FOR SUMM JUD BY US TERM LIMITS
07/28/93	STATE OF AR RESP TO MOT FOR SUMM JUD BY PLFS
07/28/93	STATE OF AR BRIEF IN OPPOSITION TO MOT FOR SUMM JUD OF PLF
07/28/93	ARKANSANS FOR GOV REFORM OBJECTION TO MOTS FO SUMM JUD BY PLFS & GEO JERNIGAN & RAY THORNTON & BRIEF IN SUPP OF OBJECTION

DATE	PROCEEDINGS
07/29/93	Order MOT OF CLETA D MITCHELL GRANTED 2-93-723
07/30/93	Order GRANTS MOT JOHN KESTER TO APPEAR 2-93-729
07/30/93	Order CONCLUSIONS OF LAW-TERM LIMITS RULED UNCONSTITUTIONAL 2-93-728
08/16/93	HEARING *SET: 08/26/93 01:30 PM LETTER SENT 16-Aug-93
08/18/93	ATTY GENERAL BRYANT BRIEF IN SUPP OF MOT TO DISM CERTAIN PARTIES
08/18/93	MOTION FILED ATTY GENERAL BRYANT MOT TO DISM CERTAIN PARTIES
08/18/93	ATY GENERAL BRYANT TO DISM AS TO THE ENACTING CLAUSE OF THE INITIATIVE PETITION FOR LACK JURISDICTION
08/18/93	ATTY GENERAL BRYANT BRIEF IN SUPP OF MOT TO DISM
08/23/93	HEARING *SET: 09/07/93 01:30 PM LETTER SENT 31-Aug-93
08/26/93	PLF BRIEF IN OPPOSITION TO MOT TO DIS AS TO ENACTING CLAUSE OF INITIATIVE PETITION FOR LACK OF JURISDICTION
08/26/93	PLF RESP TO MOT TO DIS CERTAIN PARTIES
08/26/93	PLF BRIEF IN OPPOSITION TO MOT TO DIS
08/26/93	PLF RESP TO MOT TO DIS AS TO ENACTING CLAUSE OF INITIATIVE PETITION FOR LACK OF JURISDI
08/26/93	DEF/INTER AR FOR GOVERNMENTAL REFORM RESP TO
08/26/93	Additional Defendant Attorney FRANK WILLS FOR AR FOR GOVERNMENTAL REFORM STATE OF AR MOT TO DISMISS

DATE	PROCEEDINGS
08/27/93	Judgment Appealed ARKANSANS FOR GOVERNMENTAL REFORMS
08/30/93	Judgment Appealed STATE OF AR EX REL ATTY GENERAL WINSTON WINSTON
09/01/93	MOTION FILED DEF US TERM LIMITS JOINER IN MOT TO DISM FOR LACK OF JURISDICTION
09/02/93	DEF STATE OF AR BY BRYANT RESP TO OPPOSITION TO MOT TO DISM CERTAIN PARTIES
09/02/93	RESP OF STATE TO PLF RESP TO MOT TO DISM AS TO THE ENACTING CLAUSE OF THE INITIATIVE PETITION FOR LACK OF JURISDICTION
09/02/93	AR FOR GOVERNMENTAL REFORM REQ FOR FINDINGS OF FACT
09/03/93	REPLY OF US TERM LIMITS ET AL TO PLF RESP TO MOT TO DISM AS TO THE ENACTING CLAUSE
09/08/93	Disposition by Order ALL DEFENDANTS FINAL ORD OF FINDINGS 2-93-842
09/14/93	Judgment Appealed INTERVENORS
09/17/93	MOTION FILED MOT TO MAKE FINDINGS
09/17/93	MOTION FILED INTV STATE TO MAKE FINDINGS
09/17/93	INTV STATE BRIEF IN SUPP OF MOT
09/22/93	AMENDED DESIGNATION OF RECORD
09/23/93	PLF RESP TO STATE MOT TO MAKE FINDINGS
09/23/93	PLF BRIEF IN SUPP OF PLF RESP TO STATE MOT TO MAKE FINDINGS

DATE	PROCEEDINGS
09/27/93	Order DENYING MOT FOR FINDINGS OF FACT UNDER RULE 52 OF ARCP 2-93-890
09/30/93	Judgment Appealed INTERVENOR/DEFENDANT REPUBLICAN PARTY
10/01/93	Judgment Appealed DEF MEMBERS OF AR SENATE & AR HOUSE
10/07/93	Judgment Appealed PLF CROSS-APPEAL
10/07/93	Judgment Appealed INTERVENORS DEFS APPELLANTS AMERICANS FOR TERM LIMITS & STEVE GOSS & STATEMENT OF POINTS TO BE RELIED UPON
10/08/93	Judgment Appealed DEFS JERNIGAN & DEMOCRATIC PARTY OF AR
10/08/93	Judgment Appealed AR FOR GOVERNMENTAL REFORM INC
10/25/93	Judgment Appealed US TERM LIMITS INC ET AL
10/26/93	Judgment Appealed STATE OF AR EX REL ATTY GEN WINSTON BRYANT
10/26/93	Judgment Appealed AMD
11/22/93	APPEAL TRANSCRIPT LODGED AT SUPREME COURT
01/11/94	ABSTRACT & BRIEF OF APPELLANTS

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
(LITTLE ROCK)

HILL

v.

CLINTON, *et al.*

CIVIL DOCKET FOR CASE NO.: 93-CV-157

Filed: 03/04/93

Nature of Suit: 890

Jurisdiction: Federal Question

Assigned to: Chief Judge Stephen M. Reasoner

Demand: \$0,000

Lead Docket: None

Dkt No. in Pulaski Cty Circuit: is 92-6171

Cause: 28:1441 Petition for Removal

* * * *

DOCKET ENTRIES

DATE	PROCEEDINGS
3/4/93	1 Notice of petition for removal from Pulaski Cty Circuit Court, 2nd Division; Case Number: 92-6171 (kp) [Entry date 03/09/93]
3/4/93	— COMPLAINT from Pulaski County Circuit Court (kp) [Entry date 03/09/93]
3/4/93	— ORDER permitting the Intervention of the State of Arkansas Ex Rel. Attorney General Winston Bryant as a defendant (cc: all counsel) (kp) [Entry date 03/09/93] [Edit date 03/17/93]

DATE	NR.	PROCEEDINGS
3/4/93	—	ANSWER by defendant Bill Walters (bw) [Entry date 03/15/93]
3/4/93	—	ANSWER by certain defendant Members of the Arkansas General Assembly; Cross Complaint against the Arkansas "Constitutional" Officers (bw) [Entry date 03/15/93] [Edit date 03/17/93]
3/4/93	—	MOTION by defendant Bill Clinton to dismiss (bw) [Entry date 03/15/93]
3/4/93	—	AMENDED ANSWER w/cross complaint by certain defendant Members of the Arkansas General Assembly (bw) [Entry date 03/15/93] [Edit date 03/17/93]
3/4/93	—	ANSWER by defendant Mark Riabie (bw) [Entry date 03/17/93]
3/4/93	—	RESPONSE by certain defendants of the Arkansas General Assembly to motion to dismiss of Bill Clinton [0-1] (bw) [Entry date 03/17/93] [Edit date 03/18/93]
3/4/93	—	ANSWER w/Cross-Complaint by defendant Ray Thornton (bw) [Entry date 03/17/93]
3/4/93	—	ANSWER to Complaint by intervenor-defendant State of Arkansas Ex Rel. Winston Bryant Attorney General (bw) [Entry date 03/17/93]
3/4/93	—	AMENDED ANSWER to Complaint by intervenor-defendant State of Arkansas (bw) [Entry date 03/17/93]
3/4/93	—	ANSWER by defendant Blanche Lambert (bw) [Entry date 03/17/93]
3/4/93	—	ANSWER by defendants George O Jernigan Jr and Arkansas Democratic; Cross-Complaint against defendants Packer, Bryant, McCuen, Fisher, Jones and Daniels (bw) [Entry date 03/17/93] [Edit date 03/17/93]

DATE	NR.	PROCEEDINGS
3/4/93	—	MOTION by defendant Jim Guy Tucker to dismiss (bw) [Entry date 03/17/93]
3/4/93	—	BRIEF by defendant Jim Guy Tucker in support of motion to dismiss [0-1] (bw) [Entry date 03/17/93]
3/4/93	—	MOTION by defendant Jim Guy Tucker to dismiss cross-complaint filed by certain Members of the Arkansas General Assembly (bw) [Entry date 03/17/93]
3/4/93	—	BRIEF by defendant Tucker in support of motion to dismiss cross-complaint [0-1] (bw) [Entry date 03/17/93]
3/4/93	—	ANSWER by defendants Tim Hutchinson, Asa Hutchinson and the Arkansas Republican Party (bw) [Entry date 03/17/93]
3/4/93	—	MOTION to intervene as defts by Arkansans for Governmental Reform, Lawrence Cook, Timothy Jacob, Steve Munn, Tim Epperson, Lance Curtis, Miles King, David Jamison, Sy Mendenhall, Teresa Ulery, Eual Petty, Tommy Munn, Tommy White, Bill McCollum, Richard Trubey, Leon Perry, Bruce Burks, Howard Studdard, J D Crow and Claudie Ray Ollar (bw) [Entry date 03/18/93]
3/4/93	—	ANSWER of Arkansans for Governmental Reform intervenors (bw) [Entry date 03/18/93]
3/4/93	—	ANSWER by defendant Jay Dickey (bw) [Entry date 03/18/93]
3/4/93	—	RESPONSE by certain defendants of the Arkansas General Assembly to motion to dismiss of Jim Guy Tucker [0-1] (bw) [Entry date 03/18/93]
3/4/93	—	RESPONSE by plaintiff to motion to dismiss of Jim Guy Tucker [0-1] (bw) [Entry date 03/18/93]

DATE	NR.	PROCEEDINGS
3/4/93	—	ANSWER by defendant David Pryor (bw) [Entry date 03/18/93]
3/4/93	—	ANSWER by defendant Dale Bumpers (bw) [Entry date 03/18/93]
3/4/93	—	ORDER granting the motion to intervene as defendants of Arkansans for Governmental Reform et al [0-1] (cc: all counsel) (bw) [Entry date 03/18/93]
3/4/93	—	MOTION by certain Members of the Arkansas General Assembly defendants for partial summary judgment on the issue of non-severability (bw) [Entry date 03/18/93]
3/4/93	—	BRIEF in support of motion for partial summary judgment on the issue of non-severability [0-1] (bw) [Entry date 03/18/93]
3/4/93	—	MEMORANDUM of defendant Senator Dale Bumpers on limited status in case (bw) [Entry date 03/18/93]
3/4/93	—	MOTION to intervene as defendants by Americans for Term Limits and Steve Goss (bw) [Entry date 03/18/93]
3/4/93	2	NOTICE of Removal by intervenor defendant State of Arkansas (bw) [Entry date 03/18/93]
3/4/93	3	Consent to Removal by intervenor defendant Arkansans for Governmental Reform (bw) [Entry date 03/18/93]
3/5/93	4	MOTION by intervenor defendant Arkansas, State of to extend time to file responses to all motions (kp) [Entry date 03/11/93]
3/15/93	5	MOTION by plaintiff to remand (bw) [Entry date 03/18/93]
3/15/93	6	BRIEF by plaintiff in support of motion to remand [5-1] (bw) [Entry date 03/18/93]

DATE	NR.	PROCEEDINGS
3/19/93	7	NOTICE by defts Tim Hutchinson, Asa Hutchinson, and Arkansas Republican of filing consent to removal (bt) [Entry date 03/22/93]
3/19/93	8	NOTICE by defendant Jay Dickey of filing consent to removal (bt) [Entry date 03/22/93]
3/29/93	9	MOTION by intervenor defendant Arkansas, State of to extend time to file resp to pltf's motion to remand (bt)
3/29/93	10	MOTION by movants to intervene as party defts (bt)
3/29/93	11	MEMORANDUM by movants in support of motion to intervene as party defts [10-1] (bt)
3/29/93	12	AFFIDAVIT of Jeffrey E. Langan regarding motion to intervene as party defts [10-1] (bt)
3/31/93	13	ORDER by Chief Judge Stephen M. Reasoner granting motion to extend time to file resp to pltf's motion to remand until 4/12/93 [9-1] [5-1] (cc: all counsel) (bt) [Entry date 04/01/93]
4/1/93	14	RESPONSE by plaintiff to motion for extension of time to respond to motion to remand (bt) [Entry date 04/02/93]
4/5/93	15	MOTION by the Unified members Mike Bearden, Mike Beebe and Clarence Bell, et al for remand (bt)
4/5/93	16	MEMORANDUM by the Unified Members Mike Bearden, Mike Beebe and Clarence Bell, et al in support of motion for full or partial remand [15-1] (bt)
4/6/93	17	ORDER by Chief Judge Stephen M. Reasoner scheduling hearing on 4/22/93 at 1:30; the Court will limit arguments of counsel on the following motions: to remand [5-1], to dismiss [0-1], and to intervene as defendants [0-1] [10-1] (cc: all counsel) (bt) [Entry date 04/07/93]

DATE	NR.	PROCEEDINGS
4/6/93	18	RESPONSE by the Unified Members to motion to intervene as party defts [10-1] (bt) [Entry date 04/07/93]
4/8/93	19	RESPONSE by plaintiff to motion to intervene as party defts [10-1] (bt) [Entry date 04/09/93]
4/8/93	20	BRIEF by plaintiff in opposition to motion to intervene [19-1] (bt) [Entry date 04/09/93]
4/12/93	21	OBJECTIONS by Arkansans for Governmental Reform to motion to remand of Bobbie Hill [5-1] (vjt) [Entry date 04/13/93]
4/12/93	21	OBJECTION RESPONSE by Arkansans for Governmental Reform to motion to remand of Bobbie Hill [5-1] (vjt) [Entry date 04/21/93]
4/15/93	22	RESPONSE by intervenor defendant Arkansas, State of to motion to remand [5-1] [15-1] (bt) [Entry date 04/16/93]
4/19/93	23	RESPONSE by intervenor defendant Arkansans Government to motion for full or partial remand [15-1] (bt) [Entry date 04/20/93]
4/19/93	24	RESPONSE by plaintiff to motion to intervene as defendants [0-1] (bt) [Entry date 04/20/93]
4/19/93	25	BRIEF by plaintiff in opposition to motion to intervene of Americans for Terms Limits and Steve Goss [24-1] (bt) [Entry date 04/20/93]
4/20/93	26	REPLY by movants U S Term Limits Inc, Frank Gilbert, Greg Rice, Lon Schultz, and Spencer Plumley in support of motion to intervene [10-1] (bt)
4/20/93	27	REPLY by plaintiff in support of motion to remand [5-1] (bt) [Entry date 04/21/93]

DATE	NR.	PROCEEDINGS
4/22/93	28	ORDER by Chief Judge Stephen M. Reasoner rescheduling hearing for 4/29/93 at 1:00 on the following motions: to intervene [10-1] [0-1], to dismiss [0-1] and to remand [5-1] (cc: all counsel) EOD 4/22/93 (bt)
4/23/93	29	ORDER (DOC) rescheduling hearing on 4/27/93 at 1:00 for the following motions: to intervene as defendants [0-1] [10-1], to dismiss [0-1] and to remand [5-1] (cc: all counsel) EOD 4/23/93 (bt)
4/26/93	30	MOTION by movants U S Term Limits Inc, Frank Gilbert, Greg Rice, Lon Schultz, Spencer Plumley for leave to file memorandum regarding motions to remand (bt)
4/26/93	31	MOTION by defendant David Pryor to substitute attorney Timothy W. Grooms or John E. Tull, III in place of Peter G. Kumpe (bt)
4/27/93	32	CLERK'S MINUTES: A hearing was held at 1 p.m. on Tues, 4-27-93, and at the conclusion of the hearing the Court granted plaintiffs' motion to remand filed 3-15-93. Order to be entered. (sjb) [Entry date 04/28/93]
4/28/93	33	ORDER by Chief Judge Stephen M. Reasoner granting motion to remand [5-1] and remanding case to Circuit Court of Pulaski County (cc: all counsel) EOD 4/28/93 (bt)
8/20/93	34	COURT reporter's transcript of hearing before Judge Reasoner on 4/27/93 (1 volume) (bt)

**ARKANSAS SUPREME COURT
& COURT OF APPEALS**

Case Number 93 01240

U.S. TERM LIMITS INC. *et al*

vs.

BOBBIE E. HILL *et al*

PARTIES

U.S. TERM LIMITS INC. ET AL	Primary Appellant
FRANK GILBERT	Appellant
GREG RICE	Appellant
LON SCHULTZ	Appellant
SPENCER PLUMLEY	Appellant
BOBBIE E. HILL ET AL	Primary Appellee
GOV. JIM GUY TUCKER	Appellee [sic]
STATE OF ARKANSAS EX REL.	
ATTY. GEN. W. BRYANT	Appellee [sic]
ARKANSANS FOR GOVERNMENT REFORM	Appellee [sic]
GEORGE O. JERNIGAN, JR & THE DEMOCRATIC PARTY	Appellee
THE LEAGUE OF WOMEN VOTERS	Appellee [sic]

DOCKET ENTRIES

DATE	PROCEEDINGS
11/22/1993	Lower Court Information
	Lower Court—601062 Pulaski Circuit, Second Division
	Case Number—CV92-6171
	Judge Name—CHRIS PIAZZA

DATE	PROCEEDINGS
	Print Case Card
	Transcript Filed
	Nbr of Volumes—004
	Exhibits Filed—N
	Notice of Transcript Filed
12/07/1993	Print Case Card
12/09/1993	Appellants' Motion for Admission Pro Hac Vice. U.S. TERM LIMITS INC. ET AL—Primary Appellant MR. H. WILLIAM ALLEN Appellants' Motion for Admission Pro Hac Vice. Served. 1-10-94. Appellant's motion for admission pro hac vice is granted. Holt, C.J. and Corbin, JJ., not participating. Submit Date—01/03/1994 Action Date—01/10/1994 Action—Granted Motion for an Expansion of Page Limits for U.S. U.S. TERM LIMITS INC ET AL—Primary Appellant JOHN G. KESTER Motion for an Expansion of Page Limits for U.S. Term Limits, Inc., et al with Mem- orandum of Authorities in support of Mo- tion for an Expansion of Page Limits. 1-10-94. Appellant's motion to file enlarged brief is granted. Holt, C.J., and Glaze and Corbin, JJ., not participating. Submit Date—01/03/1994 Action Date—01/10/1994 Action—Granted

DATE	PROCEEDINGS
12/13/1994	Motion to Expedite BOBBIE E. HILL ET AL—Primary Appellee MS. ELIZABETH J. ROBBEN 12-13-93. Brief in support of appellees Hill and Herget's Motion to Expedite. Served. 1-10-94. Appellee's motion to expedite briefing schedule and avace [sic] for oral argument and submission is granted. Holt, C.J., and Glaze and Corbin, JJ., not participating. 1-18-94. Appellees' briefs dued [sic] to be filed on January 31. Appellants' reply briefs due to be filed on February 5. Oral argument set for February 14, 1994. Submit Date—01/03/1994 Action Date—01/10/1994 Action—Granted
12/17/1993	Agreement to Remittal of Disqualification filed by Agreement to Remittal of Disqualification filed by Richard Hatfield.
12/20/1993	Agreement to Remittal of Disqualification filed by Agreement to Remittal of Disqualification filed by Doyle L. Webb. Agreement to Remittal of Disqualification filed by Agreement to Remittal of Disqualification filed by Elizabeth J. Robben. Agreement to Remittal of Disqualification filed by Agreement to Remittal of Disqualification filed by W. Asa Hutchinson.

DATE	PROCEEDINGS
12/21/1993	7 Day Clerks Extension BOBBIE E. HILL ET AL—Primary Appellee MR. FRANK J. WILLS Action Date—12/21/1993 Action—Granted Extension Date—01/08/1994 Agreement to Remittal of Disqualification filed by Agreement to Remittal of Disqualification filed by Scott Daniel. Agreement to Remittal of Disqualification filed by Agreement to Remittal of Disqualification filed by Karen Garnett.
12/22/1993	Noted for Oral Argument U. S. TERM LIMITS INC. ET AL—Primary Appellant JOHN G. KESTER Agreement to Remittal of Disqualification filed by Agreement to Remittal of Disqualification filed by Timothy W. Grooms. Agreement to Remittal of Disqualification filed by Agreement to Remittal of Disqualification filed by Stephen Engstrom.
12/27/1993	Agreement to Remittal of Disqualification filed by Agreement to Remittal of Disqualification filed by Sherry P. Bartley. Agreement to Remittal of Disqualification filed by Agreement to Remittal of Disqualification filed by Morgan Frankel.

DATE	PROCEEDINGS
01/05/1994	Ernie Wright appointed Spl. Justice. Ernie Wright appointed Spl. Justice. George Cracraft appointed Spl. Justice. George Cracraft appointed Spl. Justice.
01/10/1994	Appellant's Brief Tendered U.S. TERM LIMITS INC. ET AL—Primary Appellant JOHN G. KESTER Only 2 Copies. Appellant's Brief Filed BOBBIE E. HILL ET AL—Primary Appellee MR. DOYLE L. WEBB II Appellant's Brief Filed BOBBIE E. HILL ET AL—Primary Appellee KAREN JAY GARNETT Appellant's Brief Tendered BOBBIE E. HILL ET AL—Primary Appellee MR. JAMES FRANKLIN LANE Enlarged. Appellant's Brief Tendered BOBBIE E. HILL ET AL—Primary Appellee MR. RICHARD FRANKLIN HATFIELD Enlarged. Motion to File Enlarged Brief BOBBIE E. HILL ET AL—Primary Appellee MR. RICHARD FRANKLIN HATFIELD 1-10-94. Motion of the State of Arkansas to Expand the Length of Argument in its Appeal Brief. Served. Submit Date—01/18/1994

DATE	PROCEEDINGS
	Action Date—01/18/1994
	Action—Granted
	Motion to File Enlarged Brief
	BOBBIE E. HILL ET AL—Primary Appellee
	MR. FRANK J. WILLS
	Submit Date—01/18/1994
	Action Date—01/18/1994
	Action—Granted
	Appellant's Brief Filed
	GOV. JIM GUY TUCKER—Appellee
	MR. STEPHEN C. ENGSTROM
	Appellant's Brief Filed
	STATE OF ARKANSAS EX. REL. ATTY.
	GEN. W. BRYANT—Appellee
	MR. JOHN TRENTON HARMON
	Transcript Checkout by Atty.
	4 vols.
	Nbr of Volumes—004
	Exhibits Filed—N
	Letter Orders—Supreme Court
	Letter Orders—Supreme Court
	Letter Orders—Supreme Court
	Letter Orders—Supreme Court
	Letter Orders—Supreme Court
01/12/1994	Gerald Brown appointed Spl. Justice.
	Gerald Brown appointed Spl. Justice.
01/13/1994	Appellant's Brief Filed
	U. S. TERM LIMITS INC. ET AL—Primary
	Appellant
	JOHN G. KESTER

DATE	PROCEEDINGS
01/18/1994	Agreement to Remittal of Disqualification filed by
	Agreement to Remittal of Disqualification filed by Cleta D. Mitchell. Moot. Late
	Letter Orders—Supreme Court
01/19/1994	Print Case Card
	Letter Orders—Supreme Court
01/21/1994	Motion to File Enlarged Brief
	BOBBIE E. HILL ET AL—Primary Appellee
	JEFFREY HINES MOORE
	1-21-94. Motion to file enlarged brief and memorandum of authorities in support of motion to file enlarged brief. Served.
	2-7-94. Appellees' motion to file enlarged brief is granted. Dudley, J., would deny. (Brief filed 1-31-94)
	Action Date—02/07/1994
	Action—Granted
01/24/1994	Appellant's Brief Filed
	BOBBIE E. HILL ET AL—Primary Appellee
	MR. FRANK J. WILLS
	Applt. Brfs. mailed to Spl. Justices.
	Applt. Brfs. mailed to Spl. Justices.
01/25/1994	Appellant's Brief Filed
	BOBBIE E. HILL ET AL—Primary Appellee
	MR. RICHARD FRANKLIN HATFIELD
	2-7-94. Letter from Stephen Engstrom: The Unified Members waive the filing of a reply brief on their appeal. In light of the fact cross-appellants Hill and Herget have covered these issues in their brief the Unified Members see no reason to duplicate the effort.

DATE	PROCEEDINGS
01/26/1994	<p>Joint Motion for Additional Time for Oral U. S. TERM LIMITS INC. ET AL—Primary Appellant MR. H. WILLIAM ALLEN</p> <p>Joint Motion for Additional Time for Oral Argument. Served. And Memorandum in support of Joint Motion of appellants, State of Arkansas and Arkansans for Governmental Reform for additional time for argument. Served.</p> <p>2-01-94. Reply to Joint Motion of Appellants for expanded oral argument by Americans for Term Limits. Served. Motion is moot.</p> <p>2-01-94. Joint motion for expanded oral argument is granted. Dudley, J., would deny.</p> <p>Submit Date—01/31/1994 Action Date—02/01/1994 Action—Granted</p> <p>Carl B. McSpadden appointed Spl. Justice. Carl B. McSpadden appointed Spl. Justice.</p>
01/27/1994	<p>Applt. brfs. mailed to Spl. J. McSpadden. Applt. brfs. mailed to Spl. J. McSpadden.</p>
01/31/1994	<p>Appellee's Brief Filed BOBBIE E. HILL ET AL—Primary Appellee MR. RICHARD FRANKLIN HATFIELD</p> <p>Appellee's Brief Filed BOBBIE E. HILL ET AL—Primary Appellee MS. ELIZABETH J. ROBBEN</p> <p>Appellee's Brief Filed BOBBIE E. HILL ET AL—Primary Appellee</p>

DATE	PROCEEDINGS
	<p>MS. SHERRY PERKINS BARTLEY Appellee Brief/Cross Appellant Brief BOBBIE E. HILL ET AL—Primary Appellee MS. ELIZABETH J. ROBBEN</p> <p>Letter Orders—Supreme Court Letter Orders—Supreme Court</p>
02/01/1994	<p>Entry of Appearance U. S. TERM LIMITS INC. ET AL—Primary Appellant MR. SANDY MCMATH</p> <p>Entry of Appearance Served.</p> <p>Motion to Admit Cletha Deatherage Mitchell Pro BOBBIE E. HILL ET AL—Primary Appellee MR. FRANK J. WILLS</p> <p>Motion to Admit Cletha Deatherage Mitchell Pro Hac Vice. Served.</p> <p>2-14-94. Appellants' motion to admit Cleta Deatherage Mitchell pro hac vice is granted. Holt, C.J., and Newbern, Glaze, and Corbin, JJ., not participating.</p> <p>Submit Date—02/07/1994 Action Date—02/14/1994 Action—Granted</p> <p>Motion for Recusal BOBBIE E. HILL ET AL—Primary Appellee MR. FRANK J. WILLS</p> <p>Motion for Recusal Served. And Memorandum of Law in Support of Motion for Recusal.</p> <p>2-7-94. Motion for Recusal Denied. See Opinion issued this date.</p>

DATE	PROCEEDINGS
	Action Date—02/07/1994
	Action—Denied
	Letter Orders—Supreme Court
02/02/1994	Letter from Timothy W. Grooms
	BOBBIE E. HILL ET AL—Primary Appellee
	MR. TIMOTHY W. GROOMS
	Letter from Timothy W. Grooms advising that respondent Senator David Pryor does not intend to file a brief or present an oral argument at this time. Served.
02/04/1994	Motion to Supplement the Record
	U. S. TERM LIMITS INC. ET AL—Primary Appellant
	JOHN G. KESTER
	2-14-94. Motion of appellants U.S. Term Limits, Inc. et al. to supplement the record is granted. Holt, C.J., and Newbern, Glaze and Corbin, JJ., not participating.
	Submit Date—02/07/1994
	Action Date—02/14/1994
	Action—Granted
	Motion to Supplement the Record
	BOBBIE E. HILL ET AL—Primary Appellee
	MR. RICHARD FRANKLIN HATFIELD
	2-14-94. Motion of State of Arkansas Ex Rel. Attorney General Winston Bryant to supplement the record is granted. Holt, C.J., and Newbern, Glaze and Corbin, JJ., not participating.
	Submit Date—02/07/1994
	Action Date—02/14/1994
	Action—Granted

DATE	PROCEEDINGS
02/07/1994	Reply Brief Tendered
	U. S. TERM LIMITS INC. ET AL—Primary Appellant
	JOHN G. KESTER
	Exhibits in back.
	Motion to Dismiss Cross-Appeal
	U. S. TERM LIMITS INC. ET AL—Primary Appellant
	JOHN G. KESTER
	Motion to Dismiss Cross-Appeal
	Served. and Memorandum of Authorities in support. Served
	2-14-94. Motion of appellants and cross-appellees U.S. Term Limits, Inc., et al. to dismiss cross-appeal is denied. Holt, C.J., and Newbern, Glaze and Corbin, JJ., not participating.
	Action Date—02/14/1994
	Action—Denied
	Reply Brief Filed
	BOBBIE E. HILL ET AL—Primary Appellee
	MR. FRANK J. WILLS
	Reply Brief Filed
	BOBBIE E. HILL ET AL—Primary Appellee
	MR. RICHARD FRANKLIN HATFIELD
	Letter Orders—Supreme Court
	Letter Orders—Supreme Court
02/08/1994	Motion to File Exhibits to Reply Brief
	U. S. TERM LIMITS INC. ET AL—Primary Appellant
	MR. H. WILLIAM ALLEN

DATE	PROCEEDINGS
	Motion to File Exhibits to Reply Brief Served. And Memorandum of Authorities in Support of Motion to File Exhibits to Reply Brief.
	2-14-94. Motion of appellants U.S. Term Limits, Inc., et al., to file exhibits to reply brief is granted. Holt, C.J., and Newbern, Glaze and Corbin, JJ., not participating.
	Action Date—02/14/1994
	Action—Granted
	Motion for Order Granting Ten Minutes for Oral
	U. S. TERM LIMITS INC. ET AL—Primary Appellant
	MR. SANDY MCMATH
	Motion for Order Granting Ten Minutes for Oral Argument by Appellant Americans for Term Limits. Served. And Memorandum in Support of Motion by Americans for Term Limits for Order Granting it Ten Minutes for Oral Argument.
	2-14-94. Motion of appellant Americans for Term Limits for order granting it ten minutes or oral argument is denied, Holt, C.J., and Newbern, Glaze and Corbin, JJ., not participating.
	Action Date—02/14/1994
	Action—Denied
02/14/1994	Case Submitted
	Docket Type—Regular Docket
	Argument Type—Case Argued
	Supreme Court Oral Argument Issued for
	Letter Orders—Supreme Court

DATE	PROCEEDINGS
	Letter Orders—Supreme Court
	Letter Orders—Supreme Court
	Letter Orders—Supreme Court
02/16/1994	Letter Orders—Supreme Court
02/18/1994	Front Sheets—Mead
02/22/1994	Front Sheets—West
03/07/1994	Brief Costs on Appeal
	BOBBIE E. HILL ET AL—Primary Appellee
	MR. FIELD K. WASSON
	Majority Opinion
	Reversed in Part; Affirmed in Part, Special Justices Ernie Wright and Carl McSpadden join in this opinion. Dudley and Hays, JJ., and Special Chief Justice George K. Cracraft and Special Justice Gerald P. Brown concur in part and dissent in part. Holt, C.J., and Newbern, Glaze, and Corbin, JJ., not participating.
	Opinion Date—03/07/1994
	Publish—Y
	Author Name—ROBERT BROWN
	Opinion Code—Other—See Remarks
	Concur in Part/Dissent in Part Opinion
	Reversed in Part; Affirmed in Part. Special Justices Ernie Wright and Carl McSpadden join in this opinion. Dudley and Hays, JJ., and Special Chief Justice George K. Cracraft and special Justice Gerald P. Brown concur in part and dissent in part. Holt, C.J., and Newbern, Glaze and Corbin, JJ., not participating.
	Opinion Date—03/07/1994

DATE	PROCEEDINGS
	Publish—Y
	Author Name—ROBERT DUDLEY
	Opinion Code—Other—See Remarks
	Concur in Part/Dissent in Part Opinion
	Reversed in Part; Affirmed in Part. Special Justices Ernie Wright and Carl McSpadden join in this opinion. Dudley and Hays, JJ., and Special Chief Justice George K. Cracraft and Special Justice Gerald P. Brown concur in part and dissent in part. Holt, C.J., and Newbern, Glaze and Corbin, JJ., not participating.
	Opinion Date—03/07/1994
	Public—Y
	Author Name—STEELE HAYS
	Opinion Code—Other—See Remarks
	Front Sheets—Mead
03/09/1994	Petition for Rehearing
	U. S. TERM LIMITS INC. ET AL—Primary Appellant
	JOHN G. KESTER
	Petition for Rehearing. Served. And Brief in Support of Petition for Rehearing. Served.
	3-11-94. Brief of Appellees Hill and Herget et al in opposition to Petition for Rehearing by U.S. Term Limits, Inc., et al. Served.
	3-14-94. Petition of U.S. Term Limits, Inc., et al. Special Chief Justice George K. Cracraft and Special Justices Ernie Wright, Gerald Brown, and Carl McSpadden join. Hays, J., would grant. Holt, C.J. and Newbern, Glaze, and Corbin, JJ., not participating.

DATE	PROCEEDINGS
	Submit Date—03/07/1994
	Action Date—03/14/1994
	Action—Denied
	Petition for Rehearing
	BOBBIE E. HILL ET AL—Primary Appellee
	MR. RICHARD FRANKLIN HATFIELD
	Petition for Rehearing. Served.
	3-14-94. Petition of State of Arkansas ex rel. Attorney General Winston Bryant. Special Chief Justice George K. Cracraft and Special Justices Ernie Wright and Gerald Brown join. Special Justice Carl McSpadden would grant. Holt, C.J., and Newbern, Glaze, and Corbin, JJ., not participating.
	Submit Date—03/07/1994
	Action Date—03/14/1994
	Action—Denied
	Petition for Rehearing
	GOV. JIM GUY TUCKER—Appellee
	MR. STEPHEN C. ENGSTROM
	Unified Members' Petition and Argument for Rehearing or Clarification. Served.
	3-14-94. Petition of Senatorial Unified Members for petition for rehearing is denied. Special Chief Justice George K. Cracraft and Special Justices Ernie Wright and Gerald Brown join. Special Justice Carl McSpadden would grant. Holt, C.J., and Newbern, Glaze, and Corbin, JJ., not participating.
	Submit Date—03/07/1994
	Action Date—03/14/1994

DATE	PROCEEDINGS
	Action—Denied
	Front Sheets—West
03/14/1994	Letter Orders—Supreme Court
	Letter Orders—Supreme Court
	Letter Orders—Supreme Court
03/24/1994	Notice of Filing Petition in U. S. Supreme Court
	6-24-94. Order granting petition for writ of certiorari in U. S. Supreme Court. Filed.
05/26/1994	Notice of Filing Petition in U. S. Supreme Court
	6-24-94. Order granting petition for writ of certiorari in U. S. Supreme Court. Filed.

[Filed Nov. 13, 1992]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS

No. 92-6171

BOBBIE E. HILL, Individually, And On Behalf of THE
LEAGUE OF WOMEN VOTERS OF ARKANSAS And All
Others Similarly Situated,

Plaintiffs

v.

BILL CLINTON, Governor of the State of Arkansas; JIM GUY TUCKER, Lieutenant Governor; WINSTON BRYANT, Attorney General; W. J. "BILL" MCCUEN, Secretary of State; JIMMIE LOU FISHER, Treasurer of State; JULIA HUGHES JONES, Auditor of State; CHARLIE DANIELS, Land Commissioner; THE ARKANSAS CONGRESSIONAL DELEGATION, Including Members-Elect, Namely, DALE BUMPERS, DAVID PRYOR, BILL ALEXANDER, RAY THORNTON, BERYL ANTHONY, JOHN PAUL HAMMER-SCHMIDT, BLANCHE LAMBERT, TIM HUTCHINSON, and JAY DICKEY; THE ARKANSAS SENATE, Including Members-Elect, Namely, JAMES C. "JIM" SCOTT, W.D. "BILL" MOORE, JR., MIKE ROSS, WAYNE DOWD, NEELY CASSADY, GEORGE HOPKINS, JEAN C. EDWARDS, JAY BRADFORD, BILL WALTERS, TRAVIS A. MILES, LU HARDIN, EUGENE "BUD" CANADA, CHARLIE COLE CHAFFIN, VIC SNYDER, JERRY D. JEWELL, CLIFF HOOFFMAN, STANLEY RUSS, MIKE BEEBE, ROY C. "BILL" LEWELLEN, MIKE EVERETT, STEVE BELL, ALLEN GORDON, JON S. FITCH, MORRIL HARRIMAN, MIKE BEARDEN, JERRY P. BOOKOUT, MIKE TODD, NICK WILSON, STEVE LUELF, JOE E. YATES, DAVID R. MALONE,

CLARENCE BELL, JACK ANDERSON GIBSON, MAX HOWELL, JOHN PAGAN, KEVIN SMITH, JIM KEET, BILL GWATNEY, and REID HOLIMAN; THE ARKANSAS HOUSE OF REPRESENTATIVES, Including Members-Elect, Namely, RAILEY A. STEELE, JERRY E. HINSHAW, LOUIS MCJUNKIN, CHARLES W. STEWART, BOB FAIRCHILD, JERRY HUNTON, EDWARD F. THICKSTEN, B.G. HENDRIX, CAROLYN POLLAN, RALPH "BUDDY" BLAIR, JR., JERRY D. KING, W.R. "BUD" RICE, ODE MADDOX, GUS WINGFIELD, HOYE D. HORN, DAVID BEATTY, ARTHUR CARTER, CHARLES WHORTON, JR., FRANK J. WILLEMS, LLOYD R. GEORGE, KEITH WOOD, BOB J. WATTS, L.L. "DOC" BRYAN, BRUCE HAWKINS, TED E. MULLENIX, JAMES C. ALLEN, JOHN W. PARKERSON, BOB "SODY" ARNOLD, JUDY SMITH, JOHN H. DAWSON, BILLY JOE PURDOM, ROGER L. RORIE, RANDY THURMAN, W.H. "BILL" SANSON, BILL STEPHENS, LARRY MITCHELL, H. LACY LANDERS, VEO EASLEY, BOBBY G. NEWMAN, JODIE MAHONY, PHIL WYRICK, MYRA JONES, JIM ARGUE, JR., WILLIAM L. "BILL" WALKER, JR., MARK PRYOR, IRMA HUNTER BROWN, CAROL "COACH" HENRY, JAMES G. DIETZ, DOUG WOOD, MIKE WILSON, WILLIAM H. TOWNSEND, LARRY GOODWIN, JOHN E. MILLER, JOHN PAUL CAPPS, J. STURGIS MILLER, JOSETTA E. WILKINS, JACQUELINE J. ROBERTS, CHARLOTTE SCHEXNAYDER, JIMMIE DON MCKISSACK, MICHAEL K. DAVIS, THOMAS G. BAKER, ALBERT "TOM" COLLIER, V.O. "BUTCH" CALHOUN, WANDA NORTHCUTT, JAMES T. JORDAN, N.B. "NAP" MURPHY, JIM HOLLAND, TIM WOOLDRIDGE, BOBBY G. WOOD, BOBBY L. HOGUE, OWEN MILLER, J.L. "JIM" SHAVER, PAT FLANAGIN, WAYNE WAGNER, WALTER M. DAY, CHRISTENE BROWNLEE, BEN MCGEE, LLOYD C. MCCUISTON, JR., BOB MCGINNIS, ERNEST CUNNINGHAM, JIMMIE L. WILSON, BYNUM GIBSON, TIM HUTCHINSON, JAMES EDWARD "ED" GILBERT, RICHARD L. "DICK" BARCLAY, BILL D. PORTER, TOMMY E.

MITCHUM, JAMES H. "JIM" ROBERTS, WILLIAM P. "BILL" MILLS, ROBERT VAUGHAN "BOB" TEAGUE, DAVID E. ROBERTS, ARTHUR "ART" GIVENS, JR., JACK H. MCCOY, ROBERT WAYNE "BOBBY" TULLIS, JOHN M. LIPTON, G.W. "BUDDY" TURNER, TOM FORGEY, TRAVIS DOWD, DANA A. MORELAND, JIM VON GREMP, DAVE BISBEE, RANDY BRYANT, JOHN HALL, JIM HILL, DENNIS YOUNG, ARMIL O. CURRAN, D.R. "BUDDY" WALLIS, VADA SHEID, GREG WREN, E. RAY STALNAKER, MARY RIABLE, DEE BENNETT, JOE MOLINARO, DAVID CHOATE, BILL FLETCHER, MARIAN D. OWENS, and CLAUD V. CASH; GEORGE O. JERNIGAN, JR.; ASA HUTCHINSON; LULA BINNS; SHIRLEY MCFARLIN; RICHARD BIFFORD; BONNIE JOHNSON; THE REPUBLICAN PARTY OF ARKANSAS; and THE DEMOCRATIC PARTY OF ARKANSAS,

Defendants

COMPLAINT

Comes the Plaintiff, by her undersigned attorneys, and for her Complaint, states and alleges as follows:

1. Plaintiff Bobbie Hill is a citizen, resident, taxpayer and registered voter of the State of Arkansas (the "State"). The Plaintiff brings this action individually and on behalf of all other citizens, residents, taxpayers and registered voters similarly situated. The Plaintiff also brings this action on behalf of the League of Women Voters of Arkansas (the "League"). The League is an Arkansas non-profit corporation with approximately 700 active members throughout the State. The League is a non-partisan political organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. The Plaintiff is a member, the First Vice President, and the immediate past-President of the League.

2. Bill Clinton is the Governor of the State. Jim Guy Tucker is the Lieutenant Governor of the State. Winston

Bryant is the Attorney General of the State. W.J. "Bill" McCuen is the Secretary of State. Jimmie Lou Fisher is the Treasurer of State. Julia Hughes Jones is the Auditor of State. Charlie Daniels is the Land Commissioner of the State. Each of the foregoing persons is a member of the State Board of Election Commissioners.

3. Dale Bumpers and David Pryor are United States Senators from the State. Bill Alexander, Ray Thornton, Beryl Anthony, John Paul Hammerschmidt, Blanche Lambert, Tim Hutchinson and Jay Dickey are United States Representatives and Representatives-Elect from the State.

4. James C. "Jim" Scott, W.D. "Bill" Moore, Jr., Mike Ross, Wayne Dowd, Neely Cassady, George Hopkins, Jean C. Edwards, Jay Bradford, Bill Walters, Travis A. Miles, Lu Hardin, Eugene "Bud" Canada, Charlie Cole Chaffin, Vic Snyder, Jerry D. Jewell, Cliff Hoofman, Stanley Russ, Mike Beebe, Roy C. "Bill" Lewellen, Mike Everett, Steve Bell, Allen Gordon, Jon S. Fitch, Morrill Harriman, Mike Bearden, Jerry P. Bookout, Mike Todd, Nick Wilson, Steve Luelf, Joe E. Yates, David R. Malone, Clarence Bell, Jack Anderson Gibson, Max Howell, John Pagan, Kevin Smith, Jim Keet, Bill Gwatney and Reid Holiman are State Senators and Senators-Elect.

5. Railey A. Steele, Jerry E. Hinshaw, Louis McCjunkin, Charles W. Stewart, Bob Fairchild, Jerry Hunton, Edward F. Thicksten, B.G. Hendrix, Carolyn Pollan, Ralph "Buddy" Blair, Jr., Jerry D. King, W.R. "Bud" Rice, Ode Maddox, Gus Wingfield, Hoyer D. Horn, David Beatty, Arthur Carter, Charles Whorton, Jr., Frank J. Willems, Lloyd R. George, Keith Wood, Bob J. Watts, L.L. "Doc" Bryan, Bruce Hawkins, Ted E. Mullenix, James C. Allen, John W. Parkerson, Bob "Sody" Arnold, Judy Smith, John H. Dawson, Billy Joe Purdom, Roger L. Rorie, Randy Thurman, W.H. "Bill" Sanson, Bill

Stephens, Larry Mitchell, H. Lacy Landers, Veo Easley, Bobby G. Newman, Jodie Mahony, Phil Wyrick, Myra Jones, Jim Argue, Jr., William L. "Bill" Walker, Jr., Mark Pryor, Irma Hunter Brown, Carol "Coach" Henry, James G. Dietz, Doug Wood, Mike Wilson, William H. Townsend, Larry Goodwin, John E. Miller, John Paul Capps, J. Sturgis Miller, Josetta E. Wilkins, Jacqueline J. Roberts, Charlotte Schexnayder, Jimmie Don McKisack, Michael K. Davis, Thomas G. Baker, Albert "Tom" Collier, V.O. "Butch" Calhoun, Wanda Northcutt, James T. Jordan, N.B. "Nap" Murphy, Jim Holand, Tim Woolbridge, Bobby G. Wood, Bobby L. Hogue, Owen Miller, J.L. "Jim" Shaver, Pat Flanagan, Wayne Wagner, Walter M. Day, Christene Brownlee, Ben McGee, Lloyd C. McCuiston, Jr., Bob McGinnis, Ernest Cunningham, Jimmie L. Wilson, Bynum Gibson, Tim Hutchinson, James Edward "Ed" Gilbert, Richard L. "Dick" Barclay, Bill D. Porter, Tommy E. Mitchum, James H. "Jim" Roberts, William P. "Bill" Mills, Robert Vaughan "Bob" Teague, David E. Roberts, Arthur "Art" Givens, Jr., Jack H. McCoy, Robert Wayne "Bobby" Tullis, John M. Lipton, G.W. "Buddy" Turner, Tom Forgey, Travis Dowd, Dana A. Moreland, Jim von Gremp, Dave Bisbee, Randy Bryant, John Hall, Jim Hill, Dennis Young, Armil O. Curran, D.R. "Buddy" Wallis, Vada Sheid, Greg Wren, E. Ray Stalnaker, Mark Riable, Dee Bennett, Joe Molinaro, David Choate, Bill Fletcher, Marian D. Owens and Claud V. Cash are State Representatives and Representatives-Elect.

6. George O. Jernigan, Jr. is the Chairman of the Democratic Party of Arkansas and a member of the State Board of Election Commissioners. Asa Hutchinson is the Chairman of the Republican Party of Arkansas and a member of the State Board of Election Commissioners. Lula Binns, Shirley McFarlin, Richard Bifford and Bonnie Johnson are members of the State Board of Election Commissioners.

7. The Republican Party of Arkansas and the Democratic Party of Arkansas are political parties as defined in Ark. Code Ann. § 7-1-101 (Supp. 1991).

8. Plaintiff seeks a declaratory judgment pursuant to Ark. Code Ann. § 16-111-101 *et seq.* (1987) with regard to her political and constitutional rights to advocate the election of, to contribute to the election of, and to vote for, candidates for election to the Executive Department of the State, the State Senate, the State House of Representatives, and the Arkansas Congressional Delegation, without regard to the prior incumbency of any of such candidates in any such offices. This Court has jurisdiction of this action pursuant to Article 7, Sections 1 and 11 of the Arkansas Constitution, Ark. Code Ann. § 16-13-201 (1987), and the Common Law of the State of Arkansas. Venue is in this Court pursuant to Ark. Code Ann. §§ 16-60-103, 105 (1987) and Ark. Code Ann. § 16-106-101 (1987).

9. On November 3, 1992, the voters of this State approved a proposed amendment to the Arkansas Constitution entitled the "Arkansas Term Limitation Amendment" (herein, the "Amendment"). The Amendment was proposed to the people by means of an initiative petition (the "Petition"), which was filed with Defendant McCuen pursuant to Amendment 7 to the Arkansas Constitution.

10. The popular name and ballot title of the Amendment, which were printed upon the November 3, 1992 election ballot, provided as follows:

POPULAR NAME—ARKANSAS TERM LIMITATION AMENDMENT

BALLOT TITLE—An Amendment to the Constitution of the State of Arkansas limiting the number of terms that may be served by the elected officials of the Executive Department of the state to two (2) four-year terms, this department to consist of a Gov-

ernor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, Commissioner of State Lands; limiting the number of terms that may be served by members of the Arkansas House of Representatives to three (3) two-year terms, these members to be chosen every second year; limiting the number of terms that may be served by members of the Arkansas Senate to two (2) four-year terms, these members to be chosen every four years; providing that any person having been elected to three (3) or more terms as a member of the United States House of Representatives from Arkansas shall not be eligible to appear on the ballot for election to the United States House of Representatives from Arkansas; providing that any person having been elected to two (2) or more terms as a member of the United States Senate from Arkansas shall not be eligible to appear on the ballot for election to the United States Senate from Arkansas; providing for an effective date of January 1, 1993; and making the provisions applicable to all persons thereafter seeking election to the specified offices.

11. The language of the Petition that immediately followed the ballot title, which included the text of the Amendment, but which was not printed upon the November 3, 1992 election ballot, provided as follows:

SUMMARY:

This amendment provides a limit of two (2) terms to the Governor, Lieutenant Governor, Secretary of State; Treasurer of State, Auditor of State, Attorney General and Commissioner of State Lands. It provides a limit of three (3) terms to State Representatives, and a limit of two (2) terms to State Senators. It also provides that persons having been elected three (3) or more terms as a member of the

United States House of Representatives from Arkansas shall not be eligible to appear on the ballot for election to the United States House of Representatives from Arkansas. Lastly, it provides that any person having been elected to two (2) or more terms as a member of the United States Senate from Arkansas shall not be eligible to appear on the ballot for election to the United States Senate from Arkansas.

PREAMBLE:

The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, free competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of the elected officials.

SECTION 1—Executive Branch:

(a) The Executive Department of the State shall consist of a Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, all of whom shall keep their offices at the seat of government, and hold their offices for the term of four years, and until their successors are elected and qualified.

(b) No elected officials of the Executive Department of this State may serve in the same office more than two such four year terms.

SECTION 2—Legislative Branch:

(a) The Arkansas House of Representatives shall consist of members to be chosen every second year by the qualified electors of the several counties. No member of the Arkansas House of Representatives may serve more than three such two year terms.

(b) The Arkansas Senate shall consist of members to be chosen every four years by the qualified electors of the several districts. No member of the Arkansas Senate may serve more than two such four year terms.

SECTION 3—Congressional Delegation:

(a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas.

(b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas.

SECTION 4—Severability:

The provisions of this Amendment are severable, and if any should be held invalid, the remainder shall stand.

SECTION 5—Provisions Self-Executing

Provisions of the Amendment shall be self-executing.

SECTION 6—Application

(a) This Amendment to the Arkansas Constitution shall take effect and be in operation on January 1, 1993, and its provisions shall be applicable to all persons thereafter seeking election to the offices specified in this Amendment.

(b) All laws and constitutional provisions which conflict with this Amendment are hereby repealed to the extent that they conflict with this amendment.

12. Pursuant to Section 6 of the Amendment, from and after January 1, 1993, all persons with prior experience as incumbents in the offices enumerated in the Amendment will be limited with regard to their eligibility to serve additional terms in such offices, or to have their names placed on the election ballot for election to such offices, as provided in the Amendment.

13. The purpose and intent of Section 3 of the Amendment is to effectively limit the terms of the State's Congressional Delegation. The limitation is expressed in terms of a candidate's eligibility to have his or her name placed on the ballot; however, the practical effect is to impose a substantive qualification for election to these federal offices.

14. The qualifications for election as a U.S. Representative or U.S. Senator are set forth in Article I, Section 2, Clause 2 and Article I, Section 3, Clause 3 of the federal constitution. These federal constitutional qualifications are exclusive. The State of Arkansas has no power to add any additional qualifications to the ones enumerated in the federal constitution. Because Section 3 of the Amendment seeks to impose an additional qualification for election as a U.S. Representative or U.S. Senator from Arkansas, Section 3 is unconstitutional and void.

15. Sections 1 through 3 of the Amendment are inherently non-severable. The voters of this State adopted Sections 1 through 3 of the Amendment as a whole, as expressed by the words of the ballot title: "making the provisions applicable to *all persons* thereafter seeking election to the specified offices." (Emphasis added.) Although the text of the Amendment contains a severability clause in Section 4, the severability clause was not disclosed to the voters at the time that they exercised the franchise and was not expressly approved by them. In addition, the voters of this State would not have approved the Amendment without Section 3. Section 3 capitalized upon the popular issue of anti-incumbency, particularly as directed toward the U.S. House of Representatives, and thereby induced a favorable vote for the entire proposal.

16. The Petition filed with Defendant McCuen did not contain the following words preceding the text of the Amendment: "Be It Enacted By The People Of The State Of Arkansas," or words to that effect (herein, an "Enacting Clause"). None of the publications of the Amendment by Defendant McCuen to the people prior to the election contained an Enacting Clause. Due to the lack of an Enacting Clause for the Amendment, the Amendment is void and unenforceable, notwithstanding the favorable vote of the people.

WHEREFORE, Plaintiff prays for a Declaratory Judgment by this Court, declaring and holding (i) that Section 3 of the Amendment is unconstitutional and void under the federal constitution, (ii) that Sections 1 through 3 of the Amendment are non-severable and should be stricken in their entirety, and (iii) that the Amendment fails to have an Enacting Clause and is unenforceable and void in its entirety. Plaintiff further prays for her costs, and for all other just and proper relief.

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 ELIZABETH J. ROBBEN
 ROBERT S. SHAFER
 FRIDAY, ELDREDGE & CLARK
 400 West Capitol, Suite 2000
 Little Rock, Arkansas 72201
 (501) 376-2011

Attorneys for Plaintiff

By: /s/ Herschel H. Friday
 HERSCHEL H. FRIDAY

[Filed Jan. 19, 1993]

IN THE CIRCUIT COURT
 OF PULASKI COUNTY, ARKANSAS
 SECOND DIVISION

 (Title Omitted in Printing)

ANSWER

Congressman Ray Thornton, for his answer, states:

1. Lacks sufficient knowledge and information to admit or deny the allegations contained in Paragraph 1 of the Complaint.
2. Admits the allegations contained in Paragraph 2 of the Complaint.
3. Admits that Dale Bumpers and David Pryor are U.S. Senators and that Ray Thornton, Jay Dickey, Blanche Lambert and Tim Hutchinson are U.S. Representatives for Arkansas. Bill Alexander, John Paul Hamerschmidt and Beryl Anthony are former Representatives.
4. Admits that each person identified in Paragraph 4 of the Complaint is a State Senator or a former State Senator.
5. Admits that each person identified in Paragraph 5 of the Complaint is a State Representative or a former State Representative.
6. Admits the allegations contained in Paragraph 6 of the Complaint.
7. Admits the allegations contained in Paragraph 7 of the Complaint.

8. Admits that this Court has jurisdiction and venue is proper as alleged in Paragraph 8 of the Complaint.

9. Admits the allegations contained in Paragraph 9 of the Complaint.

10. Admits the allegations contained in Paragraph 10 of the Complaint.

11. Admits the allegations contained in Paragraph 11 of the Complaint.

12. Admits the allegations contained in Paragraph 12, 13, 14, 15, and 16 of the Complaint.

13. Denies all allegations of the Complaint not specifically admitted herein.

WHEREFORE, Defendant U.S. Congressman Ray Thornton prays that this Court grant to him all just and proper relief as is requested through his denials and admissions above.

CROSS COMPLAINT FOR DECLARATORY JUDGMENT

Pursuant to the provisions of A.C.A. §§ 16-111-101 *et seq.* (1987), Defendant/Cross Claimant Thornton seeks a declaratory judgment with regard to his political and constitutional rights and the legality of his actions as a U.S. Representative under the provisions of the challenged Amendment.

14. Defendant/Cross Claimant Thornton realleges all of his Admissions of the allegations set forth in Paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the Complaint.

15. Further, Defendant/Cross Claimant Thornton asserts these claims for a declaratory judgment against the Arkansas "Constitutional" Officers named in Paragraph 2 of the Complaint. As members of the Executive Department, these cross-defendants are the state officials

upon whom the responsibility falls for the execution and enforcement of the provisions of the Amendment.

16. Defendant/Cross Claimant Thornton realleges and adopts his admissions contained in Paragraphs 9, 10, 11 and 12 of his Answer regarding the language and public vote on the Amendment.

17. Defendant/Cross Claimant Thornton seeks a declaration determining the rights of the parties as they affect the legality of his service as a member of the U.S. Congress and the legality of any actions by the Cross Defendants to interpret and enforce the terms and provisions of the Act so as to preclude Defendant/Cross Claimant Thornton from seeking to appear on the ballot for another term beyond the current one which ends in January 1995. Specifically, Defendant/Cross Claimant Thornton seeks a declaration of rights with regard to the following:

- a. Under the Amendment when does one begin counting terms toward the limit on terms of service?
 - i) Does the Amendment not count any terms served prior to January 1, 1993, toward the maximum allowable terms?
 - ii) Does the term to which the member was elected in the November 3, 1992, general election (service of which did not begin until on or after January 1, 1993) count toward the maximum?
 - iii) Is non-consecutive service or service from different districts in the U.S. House of Representatives counted toward the maximum allowable terms?
- b. Does Section 3 of the Amendment violate the federal Constitution by imposing an additional qualification on the election of, or eligibility for a ballot position for, U.S. Representatives or U.S. Senators from Arkansas?

WHEREFORE, Defendant/Cross Claimant Thornton seeks a Declaratory Judgment by this Court declaring the rights of the parties and the public as to the issues raised in Paragraph 17 above; and all other just and proper relief to which he may be entitled.

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200 West Capitol Avenue
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(501) 371-0808

By /s/ Nate Coulter
NATE COULTER (85034)
Attorneys for Defendant/Cross
Claimant Ray Thornton

[Filed Jan. 22, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

MOTION TO INTERVENE AS DEFENDANT

Comes the State of Arkansas Ex Rel. Attorney General Winston Bryant, by its undersigned attorney, and for its Motion to Intervene states:

1. This action involves validity, constitutionality and interpretation of an initiated amendment to the Arkansas Constitution.

2. This action requesting declaratory judgment relief affects the State the State of Arkansas Ex Rel. Attorney General Winston Bryant by determining the limits of terms on all Constitutional, Executive and Legislative officers of the State of Arkansas, and members of the Arkansas Congressional delegation.

3. Winston Bryant has determined that he has a conflict of interest, since he could be affected by the ruling of this Court pursuant to this action.

4. The Office of the Attorney General has contracted with Richard F. Hatfield, pursuant to A.C.A. § 19-4-1709 through 1715, to perform legal services in representing the State in this matter.

5. The State is a proper party to defend the validity of the amendment as a Defendant.

6. Attached is an Answer that the State intends to file if the Motion to Intervene as Defendant is granted.

7. Granting this motion will not prejudice any other party since the time for responding to the Complaint has been extended by this Court as to certain parties, including Winston Bryant, to January 25, 1993.

WHEREFORE, the State Ex Rel. Attorney General Winston Bryant prays the Court permit the State of Arkansas to intervene as a proper party to this action by granting this Motion to Intervene.

STATE OF ARKANSAS
Ex Rel. Winston Bryant
Attorney General

By: /s/ Richard F. Hatfield
RICHARD F. HATFIELD
401 West Capitol, Suite 502
Little Rock, AR 72201

[Filed Jan. 22, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

INTERVENOR'S ANSWER TO COMPLAINT

Comes the State of Arkansas Ex Rel. Winston Bryant Attorney General, by its attorney, and pursuant to its Motion to Intervene states:

1. As to Paragraph 1 of the Complaint (references herein are to those corresponding paragraphs of the Complaint), it is without information as to the allegations and denies same.

2. As to Paragraph 2, it denies that Bill Clinton is the Governor of this State and Jim Guy Tucker is Lieutenant Governor, but it admits the other allegations.

3. As to Paragraph 3, it admits Dale Bumpers and David Pryor are United States Senators and that Ray Thornton, Blanche Lambert, Tim Hutchinson and Jay Dickey United States Representatives from this State.

4. As to Paragraph 4, it admits that those persons named who are duly elected state senators as of this date are state senators.

5. As to Paragraph 5, it admits that those persons named who are duly elected state representatives as of this date are state representatives.

6. It admits the allegations of Paragraph 6.

7. It admits the allegations of Paragraph 7.

8. It admits the allegations of Paragraph 8.
9. It admits the allegations of Paragraph 9.
10. It admits the allegations of Paragraph 10.
11. It admits the allegations of Paragraph 11.
12. It admits the allegations of Paragraph 12.
13. It denies the allegations of Paragraph 13.

14. It admits the qualifications for election as a U.S. Representative or U.S. Senator are set forth in Article I, Section 2, Clause 2 and Article I, Section 3, Clause 3 of the Federal Constitution. It denies the rest of Paragraph 14.

15. It denies the allegations of Paragraph 15.

16. As to Paragraph 16, the petition filed with Defendant McCuen did not contain the words preceding the text in the amendment "Be It Enacted By the People of the State of Arkansas,". It denies the remaining allegations of Paragraph 16.

17. It denies all allegations of the Complaint not specifically admitted.

WHEREFORE, the State prays:

A. For a declaratory judgment by this Court declaring and holding that the amendment is unconstitutional, and

B. It be awarded its costs and all other relief, to which it is entitled.

STATE OF ARKANSAS
Ex Rel. Winston Bryant
Attorney General

By: /s/ Richard F. Hatfield
RICHARD F. HATFIELD
401 West Capitol, Suite 502
Little Rock, AR 72201

[Filed Jan. 25, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

ANSWER

George O. Jernigan, Jr. and the Democratic Party of Arkansas, for their answer, state:

1. That they lack sufficient knowledge and information to admit or deny the allegations contained in Paragraph 1 of the Complaint.

2. Bill Clinton is the former Governor of the State and Jim Guy Tucker is the Governor. The office of Lieutenant Governor is vacant. Admit the allegations contained in Paragraph 2 of the Complaint.

3. Admit that Dale Bumpers and David Pryor are U.S. Senators and that Ray Thornton, Jay Dickey, Blanche Lambert and Tim Hutchinson are U.S. Representatives for Arkansas. Bill Alexander, John Paul Hammerschmidt and Beryl Anthony are former Representatives.

4. Admit that each person identified in Paragraph 4 of the Complaint is a State Senator or a former State Senator.

5. Admit that each person identified in Paragraph 5 of the Complaint is a State Representative or a former State Representative.

6. Admit the allegations contained in Paragraph 6 of the Complaint.

7. Admit the allegations contained in Paragraph 7 of the Complaint.

8. Admit that this Court has jurisdiction and venue is proper as alleged in Paragraph 8 of the Complaint.

9. Admit the allegations contained in Paragraph 9 of the Complaint.

10. Admit the allegations contained in Paragraph 10 of the Complaint.

11. Admit the allegations contained in Paragraph 11 of the Complaint.

12. Admit the allegations contained in Paragraphs 12, 13, 14, 15, and 16 of the Complaint.

13. Deny all allegations of the Complaint not specifically admitted herein.

WHEREFORE, Defendant George O. Jernigan, Jr., and the Democratic Party of Arkansas pray that this Court grant to them all just and proper relief as requested through their denials and admissions above.

CROSS-COMPLAINT FOR DECLARATORY JUDGMENT

Pursuant to the provisions of Ark. Code Ann. §§ 16-111-101 *et seq.* (1987), Defendants/Cross-claimants Jernigan and the Democratic Party seek a declaratory judgment with regard to their political and constitutional rights and the legality of their actions as the majority party in Arkansas under the provisions of the challenged Amendment.

14. Defendants/Cross-claimants Jernigan and the Democratic Party reallege all of their Admissions of the allegations set forth in Paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the Complaint and incorporate these paragraphs by reference.

15. Further, Defendants/Cross-claimants Jernigan and the Democratic Party assert their claims for a declaratory judgment against the current Arkansas "Constitutional" Officers identified in Paragraph 2 of the Complaint. These cross-defendants, specifically Governor Jim Guy Tucker, Attorney General Winston Bryant, Secretary of State Bill McCuen, Treasurer Jimmie Lou Fisher, Auditor Julia Hughes Jones, and Land Commissioner Charlie Daniels, are the state executive officials upon whom the responsibility falls for the execution and enforcement of the provisions of the Amendment.

16. Defendants/Cross-claimants Jernigan and the Democratic Party reallege and adopt their admissions contained in Paragraphs 9, 10, 11 and 12 of their Answer regarding the language and public vote on the Amendment, and affirmatively state that the terms of Section 3 of the Amendment are unconstitutional because they impose additional requirements for appearing on the ballot as a candidate for U.S. Representative or U.S. Senator beyond those exclusive qualifications and requirements set forth in the federal constitution. Moreover since Sections 1 through 3 of the Amendment are non-severable, the entire amendment is unconstitutional and void. Further, because the text of the amendment lacks an appropriate enacting clause, the entire amendment is void and unenforceable.

17. Defendants/Cross-claimants Jernigan and the Democratic Party seek a declaration determining the rights of the parties as they relate to the Democratic Party's primaries and the attempt by candidates for the U.S. Senate and House of Representatives, the Arkansas General Assembly and state constitutional offices. Defendants/Cross-claimants Jernigan and the Democratic Party further seek a declaration concerning any actions by the cross-defendants identified in paragraph 15 of this answer/cross-claim to interpret and enforce terms and provisions of the Act so as to dictate to Defendants/

Cross-claimants Jernigan and the Democratic Party which candidates may appear on the Democratic's [sic] ballot. Specifically, Defendants/Cross-claimants Jernigan and the Democratic Party seek a declaration of rights with regard to the following:

- a. Under the Amendment when does one begin counting terms toward the limit on terms of service?
 - i) Does the Amendment not count any terms served prior to January 1, 1993, toward the maximum allowable terms?
 - ii) Does the term to which one was elected in the November 3, 1992, general election (service of which did not begin until on or after January 1, 1993) count toward the maximum?
 - iii) Is non-consecutive service or service from different districts in the U.S. House of Representatives counted toward the maximum allowable terms?
 - iv) Is service in the Arkansas House of Representatives or Arkansas Senate from different districts counted toward the maximum allowable terms?
- b. Does Section 3 of the Amendment violate the federal constitution by imposing an additional qualification on the election of, or eligibility for a ballot position as a candidate for U.S. Representatives or U.S. Senators from Arkansas?
- c. Are Sections 1 through 3 non-severable and therefore void in their entirety?
- d. Is the enacting clause inadequate and ineffective such that the amendment is unenforceable in its entirety?

WHEREFORE, Defendants/Cross-claimants Jernigan and the Democratic Party seek a declaratory judgment by this Court declaring the rights of the parties and the public as to the issues raised in Paragraph 17 above; and

all other just and proper relief to which they may be entitled.

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By /s/ Nate Coulter
 NATE COULTER (85034)
 Attorneys for Defendant/Cross
 Claimants George O. Jernigan, Jr.
 and the Democratic Party of
 Arkansas

[Filed Jan. 25, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS

(Title Omitted in Printing)

ANSWER OF DEFENDANT BLANCHE LAMBERT

United States Congresswomen Blanche Lambert, by her undersigned attorneys, for her answer to Plaintiff's Complaint (the "Complaint") states and alleges that:

1. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 1 of the Complaint.

2. Defendant admits the allegations contained in Paragraph 2 of the Complaint except those allegations concerning President Bill Clinton and Governor Jim Guy Tucker, which are denied.

3. Defendant admits that Dale Bumpers and David Pryor are United States Senators and that Ray Thornton, Jay Dickey, Tim Hutchinson and Defendant are United States Representatives for Arkansas. Defendant further admits that Bill Alexander, John Paul Hammerschmidt and Beryl Anthony are former United States Representatives.

4. Defendant admits that each person identified in Paragraph 4 of the Complaint is a State Senator or a former State Senator.

5. Defendant admits that each person identified in Paragraph 5 of the Complaint is a State Representative or a former State Representative.

6. Defendant admits the allegations contained in Paragraph 6 of the Complaint.

7. Defendant admits the allegations contained in Paragraph 7 of the Complaint.

8. Defendant admits that this Court has jurisdiction and that venue is proper as alleged in Paragraph 8 of the Complaint.

9. Defendant admits the allegations contained in Paragraph 9 of the Complaint.

10. Defendant admits the allegations contained in Paragraph 10 of the Complaint.

11. Defendant admits the allegations contained in Paragraph 11 of the Complaint.

12. Defendant admits the allegations contained in Paragraphs 12, 13, 14, 15 and 16 of the Complaint.

13. Defendant denies all allegations of the Complaint which are not specifically admitted herein.

WHEREFORE, Defendant United States Congresswoman Blanche Lambert prays that this Court grant to her all just and proper relief to which this Defendant may be entitled.

MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD
320 West Capitol Avenue
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(501) 688-8800

By /s/ Sherry P. Bartley
SHERRY P. BARTLEY
Bar No. 79009

Attorneys for United States
Congresswoman Blanche Lambert

[Filed Jan. 25, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

INTERVENOR'S AMENDED ANSWER TO COMPLAINT

Comes the State of Arkansas Ex Rel. Winston Bryant Attorney General, by its attorney, and pursuant to its Motion to Intervene states:

1. As to Paragraph 1 of the Complaint (references herein are to those corresponding paragraphs of the Complaint), it is without information as to the allegations and denies same.

2. As to Paragraph 2, it denies that Bill Clinton is the Governor of this State and Jim Guy Tucker is Lieutenant Governor, but it admits the other allegations.

3. As to Paragraph 3, it admits Dale Bumpers and David Pryor are United States Senators and that Ray Thornton, Blanche Lambert, Tim Hutchinson and Jay Dickey United States Representatives from this State.

4. As to Paragraph 4, it admits that those persons named who are duly elected state senators as of this date are state senators.

5. As to Paragraph 5, it admits that those persons named who are duly elected state representatives as of this date are state representatives.

6. It admits the allegations of Paragraph 6.

7. It admits the allegations of Paragraph 7.

8. It admits the allegations of Paragraph 8.

9. It admits the allegations of Paragraph 9.

10. It admits the allegations of Paragraph 10.

11. It admits the allegations of Paragraph 11.

12. It admits the allegations of Paragraph 12.

13. It denies the allegations of Paragraph 13.

14. It admits the qualifications for election as a U.S. Representative or U.S. Senator are set forth in Article I, Section 2, Clause 2 and Article I, Section 3, Clause 3 of the Federal Constitution. It denies the rest of Paragraph 14.

15. It denies the allegations of Paragraph 15.

16. As to Paragraph 16, the petition filed with Defendant McCuen did not contain the words preceding the text in the amendment "Be It Enacted By the People of the State of Arkansas,". It denies the remaining allegations of Paragraph 16.

17. It denies all allegations of the Complaint not specifically admitted.

WHEREFORE, the State prays:

A. For a declaratory judgment by this Court declaring and holding that the amendment is constitutional, and

B. It be awarded its costs and all other relief, to which it is entitled.

STATE OF ARKANSAS
Ex Rel. Winston Bryant
Attorney General

By: /s/ Richard F. Hatfield
RICHARD F. HATFIELD
401 West Capitol, Suite 502
Little Rock, AR 72201

[Filed Jan. 25, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS

(Title Omitted in Printing)

ANSWER OF SEPARATE DEFENDANTS,
TIM HUTCHINSON, ASA HUTCHINSON
AND THE REPUBLICAN PARTY OF ARKANSAS

Comes now the Separate Defendants, Tim Hutchinson, Asa Hutchinson, and the Republican Party of Arkansas, and for their Answer to Plaintiff's Complaint:

1. Defendants admit the allegations of paragraph 1 except that Defendants deny that Plaintiff represents all taxpayers and registered voters of this state.
2. Defendants admit the allegations of paragraph 2, 3, 4, 5, 6 and 7 of Plaintiff's Complaint.
3. Defendants state that paragraph 8 is not allegations of fact. Defendants acknowledge that the Plaintiff is requesting declaratory relief.
4. Defendants admit the allegations of paragraphs 9, 10 and 11 of Plaintiff's Complaint.
5. Defendants deny the allegations of paragraphs 12, 13, 14, 15 and 16 of Plaintiff's Complaint.
6. Defendants affirmatively state that they support the concept of term limitations for elected officials. Defendants state that the Arkansas Term Limitation Amendment was properly presented to the people of the State of Arkansas and properly adopted by the voters of this state. Defendants support the right of the people to adopt such initiated measures and Defendants believe the Ar-

kansas Term Limitation Amendment is constitutionally sound and Plaintiff should be denied the relief requested.

WHEREFORE, the Separate Defendants pray that this Court grant to them all just and proper relief and further that the Arkansas Term Limitation Amendment be upheld and enforced as adopted by the people.

/s/ W. Asa Hutchinson
W. ASA HUTCHINSON #75065
Attorney for Separate Defendants
Tim Hutchinson, Asa Hutchinson,
and the Republican Party of
Arkansas
First National Bank Building
602 Garrison Avenue, Suite 505
Fort Smith, AR 72901-2534
(501) 782-4028

[Filed Jan. 26, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

MOTION TO INTERVENE AS DEFENDANTS

For their Motion To Intervene As Defendants, Arkansans For Governmental Reform, Inc. and Lawrence Cook, Timothy Jacob, Steve Munn, Tim Epperson, Lance Curtis, Miles King, David Jamison, Sy Mendenhall, Teresa Ulery, Eual Petty, Tommy Munn, Tommy White, Dr. Bill McCollum, Richard Trubey, Leon Perry, Bruce Burks, Howard Studdard, J.D. Crow and Claudie Ray Ollar state:

1. Intervenor Arkansans For Governmental Reform, Inc. is an Arkansas not-for-profit corporation which sponsored the petition drive which placed the Arkansas Term Limitation Amendment (hereinafter "Amendment") on the November 3, 1992 Arkansas general election ballot and campaigned on behalf of the proposed Amendment. The corporation also intervened in Richard Plugge, individually and on behalf of Arkansas Farm Bureau, Arkansas For Representative Democracy, and all others similarly situated, Petitioners versus W.J. "Bill" McCuen, Secretary of State, Respondent [and] Arkansans For Governmental Reform, Inc., Intervenor, numbered 92-1074, which was initiated pursuant to Amendment 7 to the Constitution of Arkansas.

2. Intervenor Lawrence Cook, Timothy Jacob, Steve Munn, Tim Epperson, Lance Curtis, Miles King, David Jamison, Sy Mendenhall, Teresa Ulery, Eual Petty, Tommy Munn, Tommy White, Dr. Bill McCollum, Richard Trubey, Leon Perry, Bruce Burks, Howard Studdard,

J.D. Crow and Claudie Ray Ollar are residents of and taxpayers to the State of Arkansas. In the petition signature drive and the general election campaign they, and a number of other Arkansans, invested substantial time, energy and money in promoting the Amendment. (The corporate and natural intervenors above named shall hereinafter be referred to as the AGR Intervenor.)

3. The AGR Intervenor are interested in protecting the integrity of the November 3, 1992 general election vote at which the Amendment was adopted by the voters of Arkansas. Their defense of the Amendment will raise questions of law common to those that will be raised by the other parties herein, and the participation of the AGR Intervenor as intervenors will not unduly delay or prejudice the adjudication of the rights of the original parties.

4. Pursuant to Rule 24(b), this honorable Court should enter an order permitting the AGR Intervenor to intervene as defendants in this action.

WHEREFORE, the AGR Intervenor pray that this Court enter an order authorizing them to intervene as defendants in this action.

ARKANSANS FOR GOVERNMENTAL
REFORM, INC., *et al.*

By /s/ James F. Lane
JAMES F. LANE
Arkansas Bar No. 75075
Post Office Box 23296
Little Rock, AR 72221-3296
501/227-8416

CLETA DEATHERAGE MITCHELL
Attorney at Law
1090 Vermont Avenue, NW Suite 510
Washington, D.C. 20005
202/371-0450

Attorney for AGR Intervenor

[Filed Jan. 26, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

**ANSWER OF ARKANSANS FOR
GOVERNMENTAL REFORM, INC. INTERVENORS**

For their Answer to the Complaint of Plaintiffs Bobbie E. Hill and the League of Women Voters of Arkansas, Intervenor Arkansans For Governmental Reform, Inc. and Lawrence Cook, Timothy Jacob, Steve Munn, Tim Epperson, Lance Curtis, Miles King, David Jamison, Sy Mendenhall, Teresa Ulery, Eual Petty, Tommy Munn, Tommy White, Dr. Bill McCollum, Richard Trubey, Leon Perry, Bruce Burks, Howard Studdard, J.D. Crow and Claudie Ray Ollar (hereinafter referred to collectively "AGR Intervenor") state:

1. The allegations of paragraph one are denied.
2. Plaintiff should be held to strict proof of the allegations of paragraphs two through seven and nine through 11.
3. With respect to the allegations of paragraph eight, AGR Intervenor admit that Act No. 274 of 1953, as amended, codified as Ark. Code Ann. Sections 16-111-101 through -111 entitles litigants to a declaratory judgment under certain circumstances but deny that Plaintiffs's claim presents a declaratory judgment justiciable issue. The jurisdictional and venue allegations are admitted.

4. The allegations of paragraphs 12, 13, 15 and 16 are denied.

5. The allegations of paragraph 14 are admitted only to the extent that Article I, Section 2, Clause 2 and Article I, Section 3, Clause 3 of the Constitution of the United States set forth the qualifications for election of U.S. Representatives and Senators.

6. AGR Intervenor state that the allegations of paragraphs 15 and 16 fail to state facts upon which this Court can grant relief.

WHEREFORE, AGR Intervenor demand judgment dismissing the Plaintiffs's Complaint herein and denying them any relief thereunder, for costs herein, plus all other just and proper relief.

ARKANSANS FOR GOVERNMENTAL
REFORM, INC., *et al.*

By /s/ James F. Lane
JAMES F. LANE
Arkansas Bar No. 75075
Post Office Box 23296
Little Rock, AR 72221-3296
501/227-8416

CLETA DEATHERAGE MITCHELL
Attorney at Law
1090 Vermont Avenue, NW
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Washington, D.C. 20005
202/371-0450

Attorney for AGR Intervenor

[Filed Feb. 1, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

ANSWER

Comes now Congressman Jay Dickey, by and through his attorneys, HILBURN, CALHOON, HARPER, PRUNISKI & CALHOUN, LTD., and for his Answer, states the following:

1. Lacks information sufficient to admit or deny the allegations contained in paragraph 1 of the Complaint and therefore denies the same.
2. Denies that Bill Clinton is Governor of the State, that Jim Guy Tucker is Lieutenant Governor of the State and that Bill Clinton is a member of the State Board of Election Commissioners. Dickey admits the remaining allegations of paragraph 2 of the Complaint.
3. Admits that Dale Bumpers and David Pryor are United States Senators from the State of Arkansas and that Ray Thornton, Blanche Lambert, Tim Hutchinson and Jay Dickey are United States Representatives from Arkansas and denies each and every other allegation of paragraph 3 of the Complaint.
- Upon information and belief, admits the allegations of paragraph 4 of the Complaint.
5. Upon information and belief, admits the allegations of paragraph 5 of the Complaint.
6. Admits the allegations of paragraph 6 of the Complaint.

7. Admits the allegations of paragraph 7 of the complaint.
8. In regard to the allegations of paragraph 8 of the Complaint, Dickey admits that this Court has jurisdiction of this action and that venue is proper in this Court and denies each and every other allegation contained in paragraph 8 of the Complaint.
9. Admits the allegations of paragraph 9 of the Complaint.
10. In regard to the allegations set forth in paragraph 10 of the Complaint, Dickey asserts that the wording of the ballot speaks for itself and denies each and every other allegation contained in paragraph 10.
11. In regard to the allegations set forth in paragraph 11 of the Complaint, Dickey asserts that the wording of the Petition speaks for itself and denies each and every other allegation contained in paragraph 11.
12. The wording of Section 6 of the Amendment speaks for itself. Dickey lacks sufficient knowledge and information to admit or deny the specific allegations contained in paragraph 12 of the Complaint including the effect on incumbents in office, and therefore denies the same.
13. Admits that the purpose and intent of Section 3 of the Amendment is to effectively limit the terms of the State's Congressional Delegation and denies each and every other allegation contained paragraph 13 of the Complaint for lack of information and for the reason that the allegations are conclusory.
14. Admits that Article I, Section 2, Clause 2, and Article I, Section 3, Clause 3 of the Constitution of the United States of America speak for themselves and do set forth certain qualifications for election as a U.S. Representative or U.S. Senator. Dickey denies each and every other allegation of paragraph 14 of the Complaint

for the reason that said allegations are conclusory, contain argument and for lack of information.

15. Dickey admits that the Amendment contains a severability clause and it speaks for itself and, denies each and every other allegation of paragraph 15 of the Complaint.

16. Dickey asserts that the Petition referred to in paragraph 16 of the Complaint speaks for itself and denies each and every other allegation of paragraph 16 of the Complaint.

17. Dickey denies each and every other allegation of the Complaint not specifically admitted herein.

18. Dickey specifically reserves the right to amend his Answer and plead further as facts and information become known to him in the future.

WHEREFORE, Congressman Jay Dickey, prays that this Court grant him the just and proper relief to which he is entitled.

Respectfully submitted,

HILBURN, CALHOON, HARPER,
PRUNISKI & CALHOUN, LTD.
One Riverfront Place
Twin City Bank Bldg., 8th Fl.
Post Office Box 5551
North Little Rock, AR 72119
(501) 372-0110

By: /s/ Scott E. Daniel
SCOTT E. DANIEL
Arkansas Bar No. 82046

[Filed Feb. 18, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

**RESPONSE OF PLAINTIFF TO MOTION TO DISMISS
OF SEPARATE DEFENDANT JIM GUY TUCKER**

Comes now plaintiff Bobbie E. Hill, individually and on behalf of the League of Women Voters of Arkansas and all others similarly situated, by and through her attorneys of record, Friday, Eldredge and Clark, and for her response to the motion to dismiss of separate defendant Jim Guy Tucker, states as follows:

1. The allegations contained in paragraph 1 of the motion to dismiss are admitted.

2. The allegations contained in paragraph 2 of the motion to dismiss are admitted.

3. The allegations contained in paragraph 3 of the motion to dismiss are admitted.

4. With the exception of the last sentence of paragraph 4 of the motion to dismiss the allegations contained in paragraph 4 are admitted. Plaintiff specifically denies the allegation in the last sentence of paragraph 4 and states affirmatively that at the expiration of the term in which Governor Tucker is now serving he will be eligible for one remaining term under the provisions of the Arkansas Term Limitation Amendment.

5. The allegations contained in paragraph 5 of the motion to dismiss are denied.

6. Considering the allegations of plaintiff's Complaint as true and all favorable inferences, Governor Tucker has not demonstrated that there is no present actual controversy nor that plaintiff is not entitled to declaratory judgment.

7. Plaintiff seeks relief pursuant to the Declaratory Judgment Statute that provides "all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the right to persons not parties to the proceeding." Ark. Code Ann. § 16-111-106 (1987). The party seeking relief pursuant to the Declaratory Judgment Statute must name all interested government representatives as parties defendant. *Block v. Allen*, 241 Ark. 970, 411 S.W.2d 21 (1967).

8. A fair and reasonable inference based on the allegations contained in the Complaint is that Governor Tucker as an incumbent will no doubt seek re-election to the Office of Governor and it is a fair and reasonable inference that plaintiff and/or the members of the class she represents intend to re-elect Governor Tucker to two more terms in addition to his current term.

9. The motion to dismiss presents no evidence outside the pleadings and therefore there is no evidence that Governor Tucker is not interested in running for two additional terms after the expiration of his current term. Thus, based on the allegations contained in the complaint and all reasonable inferences, Governor Tucker remains an interested party subject to the personal jurisdiction of this Court and required by the Declaratory Judgment Act to be joined as a party.

10. If Governor Tucker is not personally interested or presents evidence that he will not run for re-election after the expiration of his current term and a subsequent term, he should be an interested party by virtue of the fact that he is the current representative of the Office of

Governor. This Court's decision in this case will affect future holders of that office. He therefore should be deemed an interested party in his representative capacity and should be retained as a party defendant.

11. Finally, this action for declaratory judgment is one that the Court should decide "because it is a matter of significant public interest and a matter of constitutional law." *Bryant v. English*, 311 Ark. 187, — S.W.2d — (1992).

WHEREFORE, plaintiff Bobbie E. Hill, individually and on behalf of the League of Women Voters of Arkansas and all others similarly situated, prays that the motion to dismiss of separate defendant Jim Guy Tucker be denied.

Respectfully submitted,

FRIDAY, ELDRIDGE & CLARK
2000 First Commercial Building
400 West Capitol Avenue
Little Rock, Arkansas 72201-3493
(501) 376-2011

Attorneys for Plaintiffs

By: /s/ Elizabeth J. Robben
ELIZABETH J. ROBBEN #79244

[Filed Feb. 10, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

ORDER PERMITTING INTERVENTION
AS DEFENDANT

Now on this date comes on for hearing the Motion of the State of Arkansas, by Ex Rel. Attorney General Winston Bryant, by its undersigned private counsel to intervene as a Defendant. After consideration of the pleadings filed herein and other matters before the Court, the Court finds:

1. The Amended Motion has been properly served on all parties in accordance with Rule 5, ARCP.
2. No objections opposing this Motion have been filed within the time required by any party.
3. A.C.A. § 16-111-106(a) provides that, as here, when a claim for declaratory relief is sought, all persons shall be made parties who claim any interest which would be affected by the declaration. The prayer to declare the proposed amendment unconstitutional would affect the interest of the State of Arkansas. It is a claim within the provisions of A.C.A. § 16-111-106.
4. No party is prejudiced by the granting of this Motion.
5. Intervention under the provisions of Rule 24(a) (2) ARCP has been established.

6. The Amended Answer attached as an exhibit to the Amended Motion to Intervene is permitted to be filed.

IT IS, BY THE COURT, ORDERED that:

A. The Amended Motion to Intervene is granted, and

B. The State of Arkansas, Ex Rel. Winston Bryant Attorney General, is permitted to intervene as a Defendant herein and file the Amended Answer attached to its Amended Motion.

/s/ Chris Piazza
Judge

Date: Feb. 10, 1993

[Filed Feb. 19, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS

(Title Omitted in Printing)

ANSWER OF DEFENDANT SENATOR DAVID PRYOR

Senator David Pryor, for his Answers to the Complaint:

1. States he lacks sufficient knowledge and information to admit or deny the allegations contained in Paragraph 1 of the Complaint.
2. States that Bill Clinton is the former Governor of Arkansas and that Jim Guy Tucker now is the Governor of Arkansas. Admits the balance of the allegations contained in Paragraph 2 of the Complaint.
3. Admits that Ray Thornton, Blanche Lambert, Tim Hutchinson, and Jay Dickey are now United States Representatives from Arkansas and that Bill Alexander, Beryl Anthony, and John Paul Hammerschmidt are former United States Representatives from Arkansas. Admits the balance of the allegations contained in Paragraph 3 of the Complaint.
4. Admits that the individuals enumerated in Paragraph 4 of the Complaint are current or former Arkansas State Senators.
5. Admits that the individuals enumerated in Paragraph 5 of the Complaint are current or former Arkansas State Representatives.
6. Admits the allegations contained in Paragraph 6 of the Complaint.
7. Admits the allegations contained in Paragraph 7 of the Complaint.

8. Admits the allegations contained in Paragraph 8 of the Complaint.
9. Admits the allegations contained in Paragraph 9 of the Complaint.
10. Admits the allegations contained in Paragraph 10 of the Complaint.
11. Admits the allegations contained in Paragraph 11 of the Complaint.
12. With respect to the allegations in Paragraph 12 of the Complaint, Defendant states that these allegations include statements of law that may be subject to dispute and that must ultimately be determined by the courts; therefore, this Defendant is without sufficient information either to admit or deny the allegations.
13. Admits the allegations contained in Paragraph 13 of the Complaint.
14. With respect to the allegations in Paragraph 14 of the Complaint, Defendant states that these allegations include statements of law that may be subject to dispute and that must ultimately be determined by the courts; therefore, this Defendant is without sufficient information either to admit or deny the allegations.
15. With respect to the allegations in Paragraph 15 of the Complaint, Defendant states that these allegations include statements of law that may be subject to dispute and that must ultimately be determined by the courts; therefore, this Defendant is without sufficient information either to admit or deny the allegations.
16. With respect to the allegations in Paragraph 16 of the Complaint, Defendant states that these allegations include statements of law that may be subject to dispute and that must ultimately be determined by the courts; therefore, this Defendant is without sufficient information either to admit or deny the allegations.

17. Denies all allegations of the Complaint not specifically admitted.

WHEREFORE, Defendant Senator David Pryor prays that the Complaint as to him be dismissed.

WILLIAMS & ANDERSON
111 Center Street
Twenty-second Floor
Little Rock, Arkansas 72201
(501) 372-0800

By /s/ Peter G. Kumpe
PETER G. KUMPE, #72073

[Filed Feb. 23, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

ANSWER OF DEFENDANT SENATOR DALE BUMPERS

Senator Dale Bumpers, for his answer, states as follows:

1. Admits the allegations contained in Paragraph 1 of the Complaint.
2. Admits that Bill Clinton is the former Governor of Arkansas and that Jim Guy Tucker is the Governor of Arkansas. Admits the balance of the allegations contained in Paragraph 2 of the Complaint.
3. Admits that Ray Thornton, Blanche Lambert, Tim Hutchinson, and Jay Dickey are United States Representatives from Arkansas and that Bill Alexander, Beryl Anthony, and John Paul Hammerschmidt are former United States Representatives from Arkansas. Admits the balance of the allegations contained in Paragraph 3 of the Complaint.
4. Admits that the individuals enumerated in Paragraph 4 of the Complaint are current or former Arkansas State Senators.
5. Admits that the individuals enumerated in Paragraph 5 of the Complaint are current or former Arkansas State Representatives.
6. Admits the allegations contained in Paragraph 6 of the Complaint.

7. Admits the allegations contained in Paragraph 7 of the Complaint.

8. Admits the allegations contained in Paragraph 8 of the Complaint.

9. Admits the allegations contained in Paragraph 9 of the Complaint.

10. Admits the allegations contained in Paragraph 10 of the Complaint.

11. Admits the allegations contained in Paragraph 11 of the Complaint.

12. With respect to the allegations in Paragraph 12 of the Complaint, defendant takes no position in this lawsuit regarding the interpretation of Section 6 of the Amendment.

13. Admits the allegations contained in Paragraph 13 of the Complaint.

14. Admits the allegations contained in Paragraph 14 of the Complaint, except that the people of Arkansas, in common with the people of the other several states, may seek to alter the qualifications to be a United States Representative or United States Senator enumerated in the United States Constitution through the exclusive amendatory procedures prescribed in Article V of the United States Constitution.

15. Defendant takes no position in this lawsuit with respect to whether Sections 1 through 3 of the Amendment are inseverable as alleged in Paragraph 15 of the Complaint.

16. Defendant takes no position in this lawsuit with respect to the allegations about the lack of an enacting clause contained in Paragraph 16 of the Complaint.

17. Denies all allegations of the Complaint not specifically admitted.

WHEREFORE, defendant Senator Dale Bumpers prays that this Court grant to the parties all just and proper relief required by the United States Constitution.

Respectfully submitted,

/s/ Michael Davidson
 MICHAEL DAVIDSON
 Senate Legal Counsel

 KEN U. BENJAMIN, JR.
 Deputy Senate Legal Counsel

 MORGAN J. FRANKEL
 CLAIRE M. SYLVIA
 Assistant Senate Legal Counsel

 642 Hart Senate Office Building
 Washington, D.C. 20510-7250
 (202) 224-4435

 Counsel for Defendant
 Senator Dale Bumpers

Dated: February 23, 1993

[Filed Feb. 24, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

ORDER AUTHORIZING INTERVENTION

NOW BEFORE THE COURT is the Motion To Intervene Defendants, filed herein by Intervenor Arkansans For Governmental Reform, Inc. and Lawrence Cook, Timothy Jacob, Steve Munn, Tim Epperson, Lance Curtis, Miles King, David Jamison, Sy Mendenhall, Teresa Ulery, Eual Petty, Tommy Munn, Jimmy White, Dr. Bill McCollum, Richard Trubey, Leon Perry, Bruce Burks, Howard Studdard, J.D. Crow and Claudie Ray Ollar (hereinafter referred to collectively "AGR Intervenor"); and, from a consideration of said Motion and other matters, things and proof before the Court, this Court finds that:

1. AGR Intervenor's Motion To Intervene As Defendants has been properly served on all parties herein pursuant to Rule 5, Arkansas Rules of Civil Procedure.
2. No party to this action, including Intervenor Defendant State of Arkansas, has objected to granting the AGR Intervention.
3. Pursuant to Rule 24(b), ARCP, the AGR Intervenor should be permitted to intervene as Defendants herein.

It is, therefore, ORDERED that the AGR Intervenor be, and are hereby, authorized and permitted to intervene as Defendants herein and file their Answer Of Arkansans For Governmental Reform, Inc. Intervenor.

/s/ Chris Piazza
Circuit Judge
Date 2-23-93

[Filed Feb. 24, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

MOTION TO INTERVENE AS DEFENDANTS

For their Motion To Intervene As Defendants, Americans for Term Limits and Steve Goss by their Attorneys, John T. Harmon & Associates, P.A. state:

1. Intervenor Americans for Term Limits is an Arkansas not-for-profit corporation which supports term limits for elected officials and which is specifically interested in enforcing the Amendment to the Arkansas Constitution bearing the popular name: Arkansas Term Limitation Amendment.
2. Intervenor Steve Goss is a resident of and taxpayer of the State of Arkansas.
3. The Intervenor is interested in protecting the integrity of the November 3, 1992 general election vote at which the Amendment was adopted by the voters of Arkansas. Their defense of the Amendment will raise questions of law common to those that will be raised by the other parties herein, and the participation of the Intervenor as intervenor will not unduly delay or prejudice the adjudication of the rights of the original parties.
4. Pursuant to Rule 24(b), this honorable Court should enter an order permitting the Intervenor to intervene as defendants in this action.

WHEREFORE, the Intervenor pray that this Court enter an order authorizing them to intervene as defendants in this action.

AMERICANS FOR TERM LIMITS
STEVE GOSS

By /s/ John T. Harmon
JOHN T. HARMON
JOHN T. HARMON & ASSOC., P.A.
Arkansas Bar No. 68022
410 W. 3rd St., Suite 200
Little Rock, AR 72201
(501) 378-7900
Attorneys for Intervenor

[Filed Feb. 24, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

ANSWER OF AMERICANS FOR TERM LIMITS
AND STEVE GOSS, INTERVENORS

For their Answer to the Complaint of Plaintiffs Bobbie E. Hill and the League of Women Voters of Arkansas, Intervenor Americans for Term Limits, and Steve Goss (hereinafter referred to as "American Intervenor") state:

1. The allegations of paragraph one are denied.
2. Plaintiff should be held to strict proof of the allegations of paragraph two through seven and nine through 11.
3. With respect to the allegations of paragraph eight, American Intervenor admit that Act No. 274 of 1953, as amended, codified as Ark. Code Ann. Sections 16-111-101 through -111 entitles litigants to a declaratory judgment under certain circumstances, but deny that Plaintiff's claim presents a justiciable issue for declaratory judgment. The jurisdictional and venue allegations are admitted.
4. The allegations of paragraph 12, 13, 15, and 16 are denied.
5. The allegations of paragraph 14 are admitted only to the extent that Article I, Section 2, Clause 2, and Article I, Section 3, Clause 3 of the Constitution of the United States set forth the qualifications for election of U.S. Representatives and Senators.

6. American Intervenors state that the allegations of paragraph 15 and 18 fail to state facts upon which this Court can grant relief.

WHEREFORE, American Intervenors demand judgment dismissing the Plaintiff's Complaint herein and denying them any relief thereunder, for costs herein, plus all other just and proper relief.

AMERICANS FOR TERM LIMITS
STEVE GOSS

By _____
JOHN T. HARMON
JOHN T. HARMON & ASSOC., P.A.
Arkansas Bar No. 88022
410 W. 3rd St., Suite 200
Little Rock, AR 72201
(501) 378-7900
Attorneys for Intervenors

[Filed Mar. 4, 1993]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LR-C-93-157

BOBBIE E. HILL, Individually and on Behalf of the
League of Women Voters of Arkansas and
all others Similarly Situated,
Plaintiffs

v.

JIM GUY TUCKER, Governor of the
State of Arkansas; *et al.*,
Defendants

STATE OF ARKANSAS
Ex Rel. ATTORNEY GENERAL
WINSTON BRYANT,
Intervenors

NOTICE OF REMOVAL OF CIVIL ACTION

The State of Arkansas ex rel. Winston Bryant, Attorney General ("State of Arkansas") alleges and states:

STATUS OF PETITIONING DEFENDANTS
AND TIME

1. The State of Arkansas is the intervening defendant in the civil action commenced on November 13, 1992, in the Circuit Court for the State of Arkansas for Pulaski County, Second Division, No. 92-6171, styled *Hill, et al. v. Clinton et al.* (See Exhibit 1 hereto)

2. The State of Arkansas was not named as a defendant in the above-referenced action, but filed its motion to intervene as a party defendant therein, which motion was granted by the Court on February 10, 1993. (See Exhibit 2 hereto)

3. The Complaint is the initial pleading setting forth the claim upon which the action is based, and the State of Arkansas first was entitled to plead in this cause on February 10, 1993, on which date the State of Arkansas' Motion to Intervene was granted and entered. No service of process was made upon the State of Arkansas by Plaintiffs.

4. Intervenor/Defendant Arkansans for Governmental Reform ("AGR") constitute the citizens committee which sponsored the ballot question at issue, now Amendment 73 to the Arkansas Constitution, and was granted leave to intervene in the above-referenced cause on February 24, 1993. No service of process was made upon AGR by Plaintiffs.

FEDERAL JURISDICTION

5. This action is a civil action of which this Court has original jurisdiction under Title 28 U.S.C. §§ 1331 and is one which defendant is entitled to remove this Court pursuant to Title 28 U.S.C. §§ 1441(b).

6. The question presented by the Complaint in this action arises under the Constitution of the United States, namely, whether the citizens of the State of Arkansas are acting within their sovereign authority to establish a rotation of office of their elected officials, including their Congressional delegation.

7. The State of Arkansas asserts that its citizens are, indeed, acting within their sovereign authority under the United States Constitution to impose certain limits on terms for elected officials, including their federal officials, and further asserts that all claims herein can best be ad-

judicated by the federal court pursuant to 28 U.S.C. §§ 1441(c).

8. Plaintiffs have joined additional and ancillary claims in their petition. One of those claims is strictly related to and dependent upon, the federal question presented to the court. The other state law claim is such that both state law claims can properly be adjudicated by the federal court pursuant to 28 U.S.C. §§ 1441(c).

NOMINAL DEFENDANTS AND REALIGNMENT

9. All defendants named in the original action filed by Plaintiffs are nominal defendants, having been named only because of their past and anticipated future candidacies for election under the laws of the State of Arkansas.

10. The nominal defendants should either be realigned as parties plaintiff according to their interest(s) in the litigation, or dismissed by virtue of their having no interests adverse to the plaintiffs in this action which would create a justiciable controversy for determination by the Court.

11. Certain real parties in interest, namely the State of Arkansas and AGR have intervened. Other indispensable parties have not been named nor served with process in this action.

12. The defendants named by plaintiffs in this action have been included by virtue of their personal interest in having been elected to various offices by the people of Arkansas or by virtue of their potential future role as candidates for public office in Arkansas, as evidenced by the responses filed by plaintiff and certain nominal defendants (the State legislators identified as the "Unified Members") to the Motion to Dismiss filed by nominal defendant Governor Jim Guy Tucker.

13. Virtually each and every one of the named defendants in this action are, in reality, plaintiffs, all of whom seek to declare the Amendment 73 unconstitu-

tional, and should be realigned as such by the Court, as evidenced by the pleadings filed by each.

14. The few nominal defendants whose position on the merits do appear to be contrary to that argued by the plaintiffs are nonetheless not necessary parties to this action, and, as such, their consent is not necessary for removal.

15. The indispensable parties to this action are those officials who, by law, have the responsibility for certifying and preparing ballots for the election of officials, both state and federal, by the people of Arkansas. Said officials have not been named as parties to this action nor served with process herein.

16. The Board of Election Commissioners has no legal role in the actual certification of candidates for their appearance on the ballot, and, as such, the members of said Board of Election Commissioners are nominal only as defendants herein. Said nominal defendants include Bill Clinton, Jim Guy Tucker, Winston Bryant, W.J. "Bill" McCuen, Jimmie Lou Fisher, Julia Hughes Jones, Charlie Daniels, George O. Jernigan, Jr., Asa Hutchinson, Lulu Binns, Shirley McFarland, Richard Bifford and Bonnie Johnson.

17. The nominal defendants who are presently or previously elected to the Arkansas House of Representatives, the Arkansas State Senate, and the United States House of Representatives and United States Senate are, likewise, named by virtue of their having been or considered to be in the future candidates for office in and from the State of Arkansas, but have no interests adverse to the plaintiffs which would create a justiciable controversy for determination by the Court. The consent of these nominal defendants is not required for removal of this cause.

18. The nominal defendants Democratic and Republican Parties of Arkansas are, likewise, not real parties in interest nor are they indispensable parties to the ac-

tion by the plaintiffs, and their consent is not required for removal of this cause.

19. The individual supporters of Amendment 73 to the Arkansas Constitution who have been granted leave to intervene are likewise only nominal defendants, and their consent is not required for removal of this cause.

WHEREFORE, the State of Arkansas ex rel. Winston Bryant, Attorney General, files this notice of removal of the above action now pending in the Circuit Court of the State of Arkansas for Pulaski County, Second Division, No. 92-6171, from that Court to this Court.

DATED this March 4, 1993.

STATE OF ARKANSAS
Ex Rel. Winston Bryant
Attorney General

By: /s/ Richard F. Hatfield
RICHARD F. HATFIELD
401 West Capitol, Suite 502
Little Rock, AR 72201

Attorney for Intervenor/Defendant
State of Arkansas ex rel.
Winston Bryant, Attorney General

[Filed Mar. 26, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-93-157

(Title Omitted in Printing)

MOTION TO INTERVENE

Pursuant to Rules 24(a)(2) and 24(b)(2) of the Federal Rules of Civil Procedure, U.S. Term Limits, Inc., Frank Gilbert, Greg Rice, Lon Schultz, and Spencer Plumley, through undersigned counsel, hereby move to intervene as parties defendant, or otherwise as their interests may appear from the record, in the above-captioned case. The reasons are stated in the accompanying Memorandum of Law. A proposed order is also being filed herewith.

Respectfully submitted,

WILLIAMS & CONNOLLY

By: /s/ John G. Kester
JOHN G. KESTER
TERRENCE O'DONNELL
DENNIS M. BLACK
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(202) 434-5069

*Attorneys for U.S. Term
Limits, Inc., et al.*

March 26, 1993

[Filed Mar. 26, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-93-157

(Title Omitted in Printing)

DISTRICT OF COLUMBIA, SS.:

AFFIDAVIT OF JEFFREY E. LANGAN

Jeffrey E. Langan, being first duly sworn, deposes and says:

1. I am Communications Director of U.S. Term Limits, Inc. ("USTL"). I am an adult citizen of the United States. I make this affidavit of my own personal knowledge.

2. USTL is a non-profit corporation incorporated under the laws of the District of Columbia. USTL's activities have included helping to organize, fund, advise, and provide workers for petition drives and initiative campaigns in favor of term limits provisions in Arkansas and across the country. USTL has approximately 22,000 members nationwide, including many in Arkansas. USTL has exercised a major role in coordinating the national movement to enact term limits provisions, including the successful efforts in Arkansas as well as in Missouri, North Dakota, South Dakota, and Nebraska. USTL has provided support in 14 of the 15 states that have now enacted term limits. USTL is currently planning and helping to organize initiative drives in the nine states with the initiative procedure that have not yet enacted term limits provisions. Additionally, USTL is providing support for efforts to enact term limits provisions in all of the remaining states that have no initiative procedure.

3. Frank Gilbert is an adult citizen and registered voter of Arkansas. He voted for the term limits provision in 1992 and provided support to the Arkansas effort and to USTL.

4. Greg Rice is an adult citizen and registered voter of Arkansas. He voted for the term limits provision in 1992 and provided support to the Arkansas effort and to USTL.

5. Lon Schultz is an adult citizen and registered voter of Arkansas. He voted for the term limits provision in 1992 and provided support to the Arkansas effort and to USTL.

6. Spencer Plumley is an adult citizen and registered voter of Arkansas. He voted for the term limits provision in 1992 and provided support to the Arkansas effort and to USTL.

7. In Arkansas USTL helped to draft the Arkansas term limits provision, helped to organize the petition drive and initiative campaign, and provided substantial funding for voter information campaigns. Many of USTL's Arkansas members, including the individual applicants for intervention named above, provided volunteer support on behalf of the successful Arkansas term limits effort.

8. As a non-profit corporation, USTL depends upon voluntary contributions from supporters of term limits to keep its activities funded. Over 95% of USTL's funds come from private contributions from individuals. The continued availability of such voluntary funding depends upon USTL's supporters recognizing that term limits proposals are a lawful and effective means of changing the system. Court decisions questioning the legal effectiveness of term limits provisions would discourage such volunteer support and inflict economic harm on USTL and, thus injure its ability to carry out its mission. The outcome of this case therefore is important to the economic well being of USTL and to the success of its objectives.

9. USTL has expended and continues to expend significant resources in states other than Arkansas supporting term limits provisions. As a national grass-roots organization, USTL has an interest in upholding not only the Arkansas provision, but all provisions throughout the United States.

10. USTL's present efforts in states other than Arkansas will also be affected by this case. USTL's efforts to secure passage of term limits statutes or constitutional amendments in states without initiative procedures would be hampered by a ruling questioning the Arkansas term limits provisions, and conversely would be assisted by a favorable ruling. Opponents of term limits in other states would seek to use a decision in this case questioning the legal effect of term limits as justification for not supporting term limits provisions. This would be so in Iowa and Minnesota, the only states in the Eighth Circuit that have not enacted term limits proposals (and the only states in the Eighth Circuit without an initiative procedure).

11. On November 3, 1992, 60% of the voters of Arkansas voted to enact the term limits provisions that plaintiff here seeks to have this Court invalidate. Each of the individuals named above provided support—financial, volunteer work, or both—to the effort that achieved term limits for Arkansas. They desire in addition to assure that the decision of the voters of Arkansas in 1992 to enact term limits not be impeded and that they and other citizens and residents of Arkansas live under a government not dominated by the entrenched power of incumbent career politicians.

/s/ Jeffrey E. Langan
JEFFREY E. LANGAN

Subscribed and sworn before me this 26th day of March 1993:

/s/ Catherine D. Collins
Notary Public
My commission expires: April 30, 1996

[Filed March 26, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-93-157

(Title Omitted in Printing)

**ANSWER OF INTERVENOR-DEFENDANT
U.S. TERM LIMITS, INC.**

Intervenor-defendants U.S. Term Limits, Inc., Frank Gilbert, Greg Rice, Lon Schultz, and Spencer Plumley (hereinafter collectively "USTL"), through undersigned counsel, hereby answer plaintiff's Complaint, based upon knowledge, information and belief, as follows.

1. USTL lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1 and, on that basis, denies the allegations, except that USTL admits that plaintiff Hill purports to bring this action on behalf of the listed persons, associations, and entities.

2. USTL denies that Bill Clinton is the Governor of Arkansas, that Bill Clinton serves on the State Board of Election Commissioners, and that Jim Guy Tucker is the Lieutenant Governor. USTL avers that Bill Clinton is now the President of the United States and Jim Guy Tucker is now the Governor of Arkansas and a member of the State Board of Election Commissioners. USTL admits the remaining allegations of paragraph 2.

3. USTL admits that Dale Bumpers and David Pryor are United States Senators from Arkansas and that the persons listed in the second sentence of paragraph 3 are

Representatives or former United States Representatives from Arkansas.

4. USTL admits that the persons listed in paragraph 4 are State Senators or former State Senators.

5. USTL admits that the persons listed in paragraph 5 are State Representatives or former State Representatives.

6. USTL admits the allegations of paragraph 6.

7. USTL admits the allegations of paragraph 7.

8. USTL admits that plaintiff purports to seek a declaratory judgment, but denies that plaintiff's prayer for relief seeks a declaratory judgment with regard to her purported political and constitutional rights to advocate, to contribute to the election of, and to vote for candidates for election to anything but the Arkansas Congressional Delegation without regard to the prior incumbency of any of such candidates in any such offices. As a result of the removal of this action to this Court, USTL denies the remaining allegations of paragraph 8.

9. USTL admits the allegations of paragraph 9.

10. USTL states that the Amendment speaks for itself and refers the Court to the Amendment for its terms.

11. USTL states that the Amendment speaks for itself and refers the Court to the Amendment for its terms.

12. Paragraph 12 states a legal conclusion to which USTL need not respond. To the extent a response is necessary, USTL denies the allegations of paragraph 12.

13. USTL denies the allegations of the first sentence of paragraph 13, and in response to the second sentence states that the Amendment speaks for itself and refers the Court to the Amendment for its terms. USTL denies that the practical effect of the Amendment is to impose a substantive qualification for election to federal offices.

14. Paragraph 14 states a legal conclusion to which USTL need not respond. To the extent a response is required, USTL denies the allegations of paragraph 14.

15. Paragraph 15 consists principally of legal argument to which USTL need not respond. To the extent paragraph 15 contains factual allegations, they are denied.

16. In response to the first sentence of paragraph 16, USTL states that the Petition speaks for itself and refers the Court to the Petition for its terms. USTL is without knowledge or information sufficient to form a belief as to the truth of the allegations of the second sentence and on that basis denies the allegations of the second sentence. The third sentence states a legal conclusion to which USTL need not respond; to the extent a response is necessary, the allegation is denied.

17. USTL denies that plaintiff is entitled to any of the relief sought in her prayer for relief.

18. All allegations not expressly admitted are denied.

FIRST AFFIRMATIVE DEFENSE

To the extent that plaintiff's claim is premised upon the supposed significance of the alleged absence of an Enacting Clause, plaintiff's Complaint is barred by waiver and laches.

WILLIAMS & CONNOLLY

By: /s/ John G. Kester
JOHN G. KESTER
TERRENCE O'DONNELL
DENNIS M. BLACK

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*Attorneys for U.S. Term
Limits, Inc., et al.*

March 26, 1993

[Filed Apr. 28, 1993]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS WESTERN DIVISION

(Title Omitted in Printing)

ORDER

Pursuant to the findings and conclusions announced from the bench at the conclusion of the hearing held in this matter on Tuesday, April 27, 1993, plaintiff's Motion To Remand is hereby granted.

It is SO ORDERED this 28th day of April, 1993.

/s/ Stephen M. Reasoner
United States District Judge

[Filed June 2, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

No. 92-6171

BOBBIE E. HILL, Individually, And On Behalf Of THE
LEAGUE OF WOMEN VOTERS OF ARKANSAS And All
Others Similarly Situated, and DICK HERGET, Individ-
ually And On Behalf Of All Others Similarly Situated,
Plaintiffs
v.

JIM GUY TUCKER, Governor of the State of Arkansas;
WINSTON BRYANT, Attorney General; W. J. "BILL"
MC CUEN, Secretary of State; JIMMIE LOU FISHER,
Treasurer of State; JULIA HUGHES JONES, Auditor of
State; CHARLIE DANIELS, Land Commissioner; THE
ARKANSAS CONGRESSIONAL DELEGATION, Including
DAL BUMPERS, DAVID PRYOR, RAY THORNTON,
BLANCHE LAMBERT, TIM HUTCHINSON, And JAY
DICKEY; THE ARKANSAS SENATE, Including JAMES C.
"JIM" SCOTT, W.D. "BILL" MOORE, JR., MIKE ROSS,
WAYNE DOWD, NEELY CASSADY, GEORGE HOPKINS,
JEAN C. EDWARDS, JAY BRADFORD, BILL WALTERS,
TRAVIS A. MILES, LU HARDIN, EUGENE "BUD" CAN-
ADA, CHARLIE COLE CHAFFIN, VIC SNYDER, JERRY D.
JEWELL, CLIFF HOOFMAN, STANLEY RUSS, MIKE
BEEBE, ROY C. "BILL" LEWELLEN, MIKE EVERETT,
STEVE BELL, ALLEN GORDON, JON S. FITCH, MORRIL
HARRIMAN, MIKE BEARDEN, JERRY P. BOOKOUT, MIKE
TODD, NICK WILSON, STEVE LUELF, JOE E. YATES,
DAVID R. MALONE, KEVIN SMITH, JIM KEET, BILL
GWATNEY, And REID HOLIMAN; THE ARKANSAS
HOUSE OF REPRESENTATIVES, Including RAILEY A.
STEELE, JERRY E. HINSHAW, LOUIS MCJUNKIN,
CHARLES W. STEWART, BOB FAIRCHILD, JERRY HUN-
TON, EDWARD F. THICKSTEN, B.G. HENDRIX, CARO-

LYN POLLAN, RALPH "BUDDY" BLAIR, JR., JERRY D.
KING, W.R. "BUD" RICE, ODE MADDOX, GUS WING-
FIELD, HOYE D. HORN, DAVID BEATTY, ARTHUR CAR-
TER, CHARLES WHORTON, JR., FRANK J. WILLEMS,
LLOYD R. GEORGE, KEITH WOOD, BOB J. WATTS, L.L.
"DOC" BRYAN, BRUCE HAWKINS, TED E. MULLENIX,
JAMES C. ALLEN, JOHN W. PARKERSON, BOB "SODY"
ARNOLD, JUDY SMITH, JOHN H. DAWSON, BILLY JOE
PURDOM, ROGER L. RORIE, RANDY THURMAN, W.H.
"BILL" SANSON, BILL STEPHENS, LARRY MITCHELL,
H. LACY LANDERS, VEO EASLEY, BOBBY G. NEWMAN,
JODIE MAHONY, PHIL WYRICK, MYRA JONES, JIM
ARGUE, JR., WILLIAM L. "BILL" WALKER, JR., MARK
PRYOR, IRMA HUNTER BROWN, CAROL "COACH"
HENRY, JAMES G. DIETZ, DOUG WOOD, MIKE WILSON,
WILLIAM H. TOWNSEND, LARRY GOODWIN, JOHN E.
MILLER, JOHN PAUL CAPPS, J. STURGIS MILLER,
JOSETTA E. WILKINS, JACQUELINE J. ROBERTS, CHAR-
LOTTE SCHEXNAYDER, JIMMIE DON MCKISSACK,
MICHAEL K. DAVIS, THOMAS G. BAKER, ALBERT
"TOM" COLLIER, V.O. "BUTCH" CALHOUN, WANDA
NORTHCUTT, JAMES T. JORDAN, N.B. "NAP" MURPHY,
JIM HOLLAND, TIM WOOLDRIDGE, BOBBY G. WOOD,
BOBBY L. HOGUE, OWEN MILLER, J.L. "JIM" SHAVER,
PAT FLANAGIN, WAYNE WAGNER, WALTER M. DAY,
CHRISTENE BROWNLEE, BEN MCGEE, LLOYD C. MC-
CUISTON, JR., BOB MCGINNIS, ERNEST CUNNINGHAM,
JIMMIE L. WILSON, BYNUM GIBSON, DAVE BISBEE,
RANDY BRYANT, JOHN HALL, JIM HILL, DENNIS
YOUNG, ARMIL O. CURRAN, D.R. "BUDDY" WALLIS,
VADA SHEID, GREG WREN, E. RAY STALNAKER, MARK
RIABLE, DEE BENNETT, JOE MOLINARO, DAVID
CHOATE, BILLI FLETCHER, MARIAN D. OWENS, And
CLAUD V. CASH; GEORGE O. JERNIGAN, JR., ASA
HUTCHINSON; LULA BINNS; SHIRLEY MCFARLIN;
RICHARD BIFFORD; BONNIE JOHNSON; THE REPUB-
LICAN PARTY OF ARKANSAS; And THE DEMOCRATIC
PARTY OF ARKANSAS,
Defendants

AMENDED COMPLAINT

Comes the Plaintiffs, by their undersigned attorneys, and for their Amended Complaint, state and allege as follows:

PARTIES

1. Plaintiff Bobbie Hill is a United States citizen and a citizen, resident, taxpayer and registered voter of the State of Arkansas (the "State"). She brings this action individually and on behalf of all other citizens, residents, taxpayers and registered voters similarly situated. She also brings this action on behalf of the League of Women Voters of Arkansas (the "League"). The League is an Arkansas non-profit corporation with approximately 700 active members throughout the State. The League is a non-partisan political organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. Bobbie Hill is a member, the First Vice President, and the immediate past-President of the League. Bobbie Hill also resides within the 38th Legislative District for the State House of Representatives.

2. Plaintiff Dick Herget is a United States citizen and a citizen, resident, taxpayer and registered voter of the State in Pulaski County. He joins this action individually and on behalf of all other citizens, residents, taxpayers and registered voters similarly situated. Dick Herget is a registered voter in the Second Congressional District of the State.

3. Jim Guy Tucker is the Governor of the State. Winston Bryant is the Attorney General of the State. W.J. "Bill" McCuen is the Secretary of State. Jimmie Lou Fisher is the Treasurer of State. Julia Hughes Jones is the Auditor of State. Charlie Daniels is the Land Commissioner of the State. Each of the foregoing persons is a member of the State Board of Election Commissioners.

4. Dale Bumpers and David Pryor are United States Senators from the State. Ray Thornton, Blanche Lambert, Tim Hutchinson and Jay Dickey are United States Representatives from the State.

5. James C. "Jim" Scott, W.D. "Bill" Moore, Jr., Mike Ross, Wayne Dowd, Neely Cassady, George Hopkins, Jean C. Edwards, Jay Bradford, Bill Walters, Travis A. Miles, Lu Hardin, Eugene "Bud" Canada, Charlie Cole Chaffin, Vic Snyder, Jerry D. Jewell, Cliff Hoofman, Stanley Russ, Mike Beebe, Roy C. "Bill" Lewellen, Mike Everett, Steve Bell, Allen Gordon, Jon S. Fitch, Morrill Harriman, Mike Bearden, Jerry P. Bookout, Mike Todd, Nick Wilson, Steve Luelf, Joe E. Yates, David R. Malone, Kevin Smith, Jim Keet, Bill Gwatney and Reid Holiman are State Senators.

6. Railey A. Steele, Jerry E. Hinshaw, Louis McJunkin, Charles W. Stewart, Bob Fairchild, Jerry Hunton, Edward F. Thicksten, B.G. Hendrix, Carolyn Pollan, Ralph "Buddy" Blair, Jr., Jerry D. King, W.R. "Bud" Rice, Ode Maddox, Gus Wingfield, Hoyer D. Horn, David Beatty, Arthur Carter, Charles Whorton, Jr., Frank J. Willems, Lloyd R. George, Keith Wood, Bob J. Watts, L.L. "Doc" Bryan, Bruce Hawkins, Ted E. Mullenix, James C. Allen, John W. Parkerson, Bob "Sody" Arnold, Judy Smith, John H. Dawson, Billy Joe Purdom, Roger L. Rorie, Randy Thurman, W.H. "Bill" Sanson, Bill Stephens, Larry Mitchell, H. Lacy Landers, Veo Easley, Bobby G. Newman, Jodie Mahony, Phil Wyrick, Myra Jones, Jim Argue, Jr., William L. "Bill" Walker, Jr., Mark Pryor, Irma Hunter Brown, Carol "Coach" Henry, James G. Dietz, Doug Wood, Mike Wilson, William H. Townsend, Larry Goodwin, John E. Miller, John Paul Capps, J. Sturgis Miller, Josetta E. Wilkins, Jacqueline J. Roberts, Charlotte Schexnayder, Jimmie Don McKissack, Michael K. Davis, Thomas G. Baker, Albert "Tom" Collier, V.O. "Butch" Calhoun, Wanda Northcutt, James T. Jordan, N.B. "Nap" Murphy, Jim Holland, Tim Woold-

ridge, Bobby G. Wood, Bobby L. Hogue, Owen Miller, J.L. "Jim" Shaver, Pat Flanagan, Wayne Wagner, Walter M. Day, Christene Brownlee, Ben McGee, Lloyd C. McCuiston, Jr., Bob McGinnis, Ernest Cunningham, Jimmie L. Wilson, Bynum Gibson, Dave Bisbee, Randy Bryant, John Hall, Jim Hill, Dennis Young, Armil O. Curran, D.R. "Buddy" Wallis, Vada Sheid, Greg Wren, E. Ray Stalnaker, Mark Riabie, Dee Bennett, Joe Molinaro, David Choate, Bill Fletcher, Marian D. Owens and Claud V. Cash are State Representatives.

7. George O. Jernigan, Jr. is the Chairman of the Democratic Party of Arkansas and a member of the State Board of Election Commissioners. Asa Hutchinson is the Chairman of the Republican Party of Arkansas and a member of the State Board of Election Commissioners. Lula Binns, Shirley McFarlin, Richard Bifford and Bonnie Johnson are members of the State Board of Election Commissioners.

8. The Republican Party of Arkansas and the Democratic Party of Arkansas are political parties as defined in Ark. Code Ann. § 7-1-101 (Supp. 1991).

JURISDICTION AND VENUE

9. Plaintiffs seek declaratory judgment pursuant to Ark. Code Ann. § 16-111-101 *et seq.* (1987) with regard to their political and constitutional rights to advocate the election of, to contribute to the election of, and to vote for, candidates for election to the Executive Department of the State, the State Senate, the State House of Representatives, and the Arkansas Congressional Delegation, without regard to the prior incumbency of any of such candidates in any such offices. Venue is in this Court pursuant to Ark. Code Ann. §§ 16-60-103, 105 (1987) and Ark. Code Ann. § 16-106-101 (1987).

BACKGROUND FACTS

10. On November 3, 1992, the voters of this State approved a proposed amendment to the Arkansas Constitution entitled the "Arkansas Term Limitation Amendment" (herein, the "Amendment"). The Amendment was proposed to the people by means of an initiative petition (the "Petition"), which was filed with Defendant McCuen pursuant to Amendment 7 to the Arkansas Constitution.

11. The popular name and ballot title of the Amendment, which were printed upon the November 3, 1992 election ballot, provided as follows:

POPULAR NAME—ARKANSAS TERM LIMITATION AMENDMENT

BALLOT TITLE—An Amendment to the Constitution of the State of Arkansas limiting the number of terms that may be served by the elected officials of the Executive Department of the state to two (2) four-year terms, this department to consist of a Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, Commissioner of State Lands; limiting the number of terms that may be served by members of the Arkansas House of Representatives to three (3) two-year terms, these members to be chosen every second year; limiting the number of terms that may be served by members of the Arkansas Senate to two (2) four-year terms, these members to be chosen every four years; providing that any person having been elected to three (3) or more terms as a member of the United States House of Representatives from Arkansas shall not be eligible to appear on the ballot for election to the United States House of Representatives from Arkansas; providing that any person having been elected to two (2) or more terms as a member of the United States Senate from Ar-

kansas shall not be eligible to appear on the ballot for election to the United States Senate from Arkansas; providing for an effective date of January 1, 1993; and making the provisions applicable to all persons thereafter seeking election to the specified offices.

12. The language of the Petition that immediately followed the ballot title, which included the text of the Amendment, but which was not printed upon the November 3, 1992 election ballot, provided as follows:

SUMMARY:

This amendment provides a limit of two (2) terms to the Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General and Commissioner of State Lands. It provides a limit of three (3) terms of State Representatives, and a limit of two (2) terms to State Senators. It also provides that persons having been elected three (3) or more terms as a member of the United States House of Representatives from Arkansas shall not be eligible to appear on the ballot for election to the United States House of Representatives from Arkansas. Lastly, it provides that any person having been elected to two (2) or more terms as a member of the United States Senate from Arkansas shall not be eligible to appear on the ballot for election to the United States Senate from Arkansas.

PREAMBLE:

The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competi-

tive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of the elected officials.

SECTION 1—Executive Branch:

(a) The Executive Department of the State shall consist of a Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, all of whom shall keep their offices at the seat of government, and hold their offices for the term of four years, and until their successors are elected and qualified.

(b) No elected officials of the Executive Department of this State may serve in the same office more than two such four year terms.

SECTION 2—Legislative Branch:

(a) The Arkansas House of Representatives shall consist of members to be chosen every second year by the qualified electors of the several counties. No member of the Arkansas House of Representatives may serve more than three such two year terms.

(b) The Arkansas Senate shall consist of members to be chosen every four years by the qualified electors of the several districts. No member of the Arkansas Senate may serve more than two such four year terms.

SECTION 3—Congressional Delegation:

(a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the

United States House of Representatives from Arkansas.

(b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas.

SECTION 4—Severability:

The provisions of this Amendment are severable, and if any should be held invalid, the remainder shall stand.

SECTION 5—Provisions Self-Executing

Provisions of the Amendment shall be self-executing.

SECTION 6—Application

(a) This Amendment to the Arkansas Constitution shall take effect and be in operation on January 1, 1993, and its provisions shall be applicable to all persons thereafter seeking election to the offices specified in this Amendment.

(b) All laws and constitutional provisions which conflict with this Amendment are hereby repealed to the extent that they conflict with this amendment.

13. Pursuant to Section 6 of the Amendment, from and after January 1, 1993, all persons with prior experience as incumbents in the offices enumerated in the Amendment will be limited with regard to their eligibility to serve additional terms in such offices, or to have their names placed on the election ballot for election to such offices, as provided in the Amendment.

14. The purpose and intent of Section 3 of the Amendment is to effectively limit the terms of the State's

Congressional Delegation. The limitation is expressed in terms of a candidate's eligibility to have his or her name placed on the ballot; however, the practical effect is to impose a substantive qualification for election to these federal offices.

15. Plaintiffs' present plans, desires, hopes and efforts to campaign for, raise money for, contribute to, associate with, support and otherwise promote the candidates of their choice for re-election are hampered, impaired and discriminated against by the existence of the Amendment.

16. Plaintiff Dick Herget plans, desires and hopes to re-elect Congressman Ray Thornton to the United States House of Representatives for the Second Congressional District of Arkansas. Congressman Thornton intends to run for re-election in 1994 but for the effects of the Amendment on his re-election campaign.

17. Congressman Thornton previously served three terms in the United States House of Representatives and his re-election campaign is hampered and impaired because of uncertainties regarding his eligibility for the 1994 election. The uncertainties regarding the constitutionality and applicability of the Amendment to Congressman Thornton's re-election campaign places a cloud upon Dick Herget's efforts to campaign for, raise money for, contribute to, associate with, support or otherwise promote Congressman Thornton for re-election.

18. Plaintiff Bobbie Hill plans, desires and hopes to re-elect John Dawson to the State House of Representatives. On information and belief, John Dawson intends to run for re-election in 1994 but for the effects of the Amendment upon his re-election campaign.

19. John Dawson previously served seven terms in addition to his current term in the State House of Representatives and his re-election campaign is hampered and impaired because of uncertainties regarding his eligibility

for the 1994 election. The uncertainties regarding the constitutionality and applicability of the Amendment to John Dawson's re-election campaign places a cloud upon Bobbie Hill's efforts to campaign for, raise money for, contribute to, associate with, support and otherwise promote John Dawson for re-election.

COUNT I

(QUALIFICATIONS CLAUSE)

15. The qualifications for election as a U.S. Representative or U.S. Senator are set forth in Article I, Section 2, Clause 2 and Article I, Section 3, Clause 3 of the federal constitution. These federal constitutional qualifications are exclusive. The State of Arkansas has no power to add any additional qualifications to the ones enumerated in the federal constitution. The Amendment seeks to impose an additional qualification for election as a U.S. Representative or U.S. Senator from Arkansas, Section 3 is unconstitutional and void.

COUNT II

(RIGHT OF ASSOCIATION)

16. The Amendment violates Plaintiffs' rights of association and freedom of expression guaranteed by the First and Fourteenth Amendments to the United States Constitution.

COUNT III

(REPUBLICAN FORM OF GOVERNMENT)

17. The Amendment violates Article IV, Section 3 of the United States Constitution, guaranteeing each State a republican form of government.

COUNT IV

(SUPREMACY CLAUSE)

18. The Amendment violates Article VI, cl.2 of the United States Constitution, the Supremacy Clause.

COUNT V

(SEVERABILITY)

19. The Amendment is inherently non-severable. The voters of this State adopted the Amendment as a whole, as expressed by the words of the ballot title: "making the provisions applicable to *all persons* thereafter seeking election *to the specified offices*." (Emphasis added.) Although the text of the Amendment contains a severability clause in Section 4, the severability clause was not disclosed to the voters at the time that they exercised the franchise and was not expressly approved by them. In addition, the voters of this State would not have approved the Amendment without Section 3. Section 3 capitalized upon the popular issue of anti-incumbency, particularly as directed toward the U.S. House of Representatives, and thereby induced a favorable vote for the entire proposal. Sections 1 through 3 are so intertwined that the voters could not have intended Sections 1 and 2 to stand without Section 3 despite the undisclosed severability clause.

COUNT VI

(ENACTING CLAUSE)

20. The Petition filed with Defendant McCuen did not contain the following words preceding the text of the Amendment: "Be It Enacted By The People Of The State of Arkansas," or words to that effect (herein, an "Enacting Clause"). None of the publications of the Amendment by Defendant McCuen to the people prior to the election contained an Enacting Clause. Due to the lack of an Enacting Clause for the Amendment, the Amendment is void and unenforceable, notwithstanding the favorable vote of the people.

PRAYER

WHEREFORE, Plaintiffs pray for a Declaratory Judgment by this Court, declaring and holding (i) that the Amendment is unconstitutional and void under the federal

constitution, (ii) that Sections 1 through 3 of the Amendment are non-severable and should be stricken in their entirety, and (iii) that the Amendment fails to have an Enacting Clause and is unenforceable and void in its entirety. Plaintiffs further pray for their costs, and for all other just and proper relief.

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ELIZABETH J. ROBBEN
ROBERT S. SHAFER
JEFFREY H. MOORE
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(501) 376-2011

Attorneys for Plaintiffs

By: /s/ Elizabeth J. Robben
ELIZABETH J. ROBBEN

[Filed June 18, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

ANSWER AND CROSS-COMPLAINT OF
GEORGE O. JERNIGAN AND THE DEMOCRATIC PARTY
OF ARKANSAS TO AMENDED COMPLAINT

George O. Jernigan, Jr. and the Democratic Party of Arkansas, for their answer to plaintiffs' Amended Complaint, state:

1. That they lack sufficient knowledge and information to admit or deny the allegations contained in Paragraph 1 of the Amended Complaint.
2. That they lack sufficient knowledge and information to admit or deny the allegations contained in Paragraph 2 of the Amended Complaint.
3. Admit the allegations contained in Paragraph 3 of the Amended Complaint.
4. Admit the allegations contained in Paragraph 4 of the Amended Complaint.
5. Admit that each person identified in Paragraph 5 of the Amended Complaint is a State Senator or a former State Senator.
6. Admit that each person identified in Paragraph 6 of the Amended Complaint is a State Representative or a former State Representative.
7. Admit the allegations contained in Paragraph 7 of the Amended Complaint.

8. Admit the allegations contained in Paragraph 8 of the Amended Complaint.

9. Admit that this Court has jurisdiction and venue is proper as alleged in Paragraph 9 of the Amended Complaint.

10. Admit the allegations contained in Paragraph 10 of the Amended Complaint.

11. Admit the allegations contained in Paragraphs 11, 12 and 13 of the Amended Complaint.

12. Admit the allegations contained in Paragraph 14 of the Amended Complaint.

13. That they lack sufficient knowledge and information to admit or deny the allegations contained in Paragraph 15 of the Amended Complaint.

14. That they lack sufficient knowledge and information to admit or deny the allegations contained in Paragraph 16 of the Amended Complaint.

15. That they lack sufficient knowledge and information to admit or deny the allegations contained in Paragraph 17 of the Amended Complaint.

16. That they lack sufficient knowledge and information to admit or deny the allegations contained in Paragraphs 18 and 19 of the Amended Complaint.

17. Admit the allegations contained in the second Paragraphs 15, 16, 17, 18, 19 and 20 of the Amended Complaint.

18. That they adopt and reallege all statements contained in their answer to plaintiffs' original Complaint.

19. Deny all allegations of the Amended Complaint not specifically admitted herein.

WHEREFORE, Defendants George O. Jernigan, Jr. and the Democratic Party of Arkansas pray that this

Court grant to them all just proper relief as requested through their denials and admissions above.

CROSS-COMPLAINT FOR DECLARATORY JUDGMENT

Pursuant to the provisions of Ark. Code Ann. §§ 16-111-101 *et seq.* (1987), Defendants/Cross-claimants Jernigan and the Democratic Party seek a declaratory judgment with regard to their political and constitutional rights and the legality of their actions as the majority party in Arkansas under the provisions of the challenged Amendment.

20. Defendants/Cross-claimants Jernigan and the Democratic Party reallege all of their Admissions of the allegations set forth in Paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 and second Paragraphs 15, 16, 17, 18, 19 and 20 of the Amended Complaint and incorporate these paragraphs by reference.

21. Further, Defendants/Cross-claimants Jernigan and the Democratic Party assert their claims for a declaratory judgment against the current Arkansas "Constitutional" Officers identified in Paragraph 3 of the Amended Complaint. These cross-defendants, specifically Governor Jim Guy Tucker, Attorney General Winston Bryant, Secretary of State Bill McCuen, Treasurer Jimmie Lou Fisher, Auditor Julia Hughes Jones, and Land Commissioner Charlie Daniels, are the state executive officials upon whom the responsibility falls for the execution and enforcement of the provisions of the Amendment.

22. Defendants/Cross-claimants Jernigan and the Democratic Party reallege and adopt their admissions contained in Paragraphs 10 and 11 of their Answer regarding the language and public vote on the Amendment, and affirmatively state that the terms of Section 3 of the Amendment are unconstitutional because they impose additional requirements for appearing on the ballot as a candidate for U.S. Representative or U.S. Senator beyond

those exclusive qualifications and requirements set forth in the federal constitution. Moreover since Sections 1 through 3 of the Amendment are non-severable, the entire Amendment is unconstitutional and void. Further, because the text of the Amendment lacks an appropriate enacting clause, the entire Amendment is void and unenforceable.

23. Defendants/Cross-claimants Jernigan and the Democratic Party seek a declaration determining the rights of the parties as they relate to the Democratic Party's primaries and the attempt by candidates for the U.S. Senate and House of Representatives, the Arkansas General Assembly and state constitutional offices. Defendants/Cross-claimants Jernigan and the Democratic Party further seek a declaration concerning any actions by the cross-defendants identified in paragraph 21 of this Answer/Cross-Complaint to interpret and enforce terms and provisions of the Act so as to dictate to Defendants/Cross-claimants Jernigan and the Democratic Party which candidates may appear on the Democrat's ballot. Specifically, Defendants/Cross-claimants Jernigan and the Democratic Party seek a declaration of rights with regard to the following:

- a. Under the Amendment when does one begin counting terms toward the limit on terms of service?
 - i) Does the Amendment not count any terms served prior to January 1, 1993, toward the maximum allowable terms?
 - ii) Does the term to which one was elected in the November 3, 1992, general election (service of which did not begin until on or after January 1, 1993) count toward the maximum?
 - iii) Is non-consecutive service or service from different districts in the U.S. House of Representatives counted toward the maximum allowable terms?

- iv) Is service in the Arkansas House of Representatives or Arkansas Senate from different districts counted toward the maximum allowable terms?
- b. Does Section 3 of the Amendment violate the federal constitution by imposing an additional qualification on the election of, or eligibility for a ballot position as a candidate for U.S. Representatives or U.S. Senators from Arkansas?
- c. Are Sections 1 through 3 non-severable and therefore void in their entirety?
- d. Is the enacting clause inadequate and ineffective such that the Amendment is unenforceable in its entirety?

WHEREFORE, Defendants/Cross-claimants Jernigan and the Democratic Party seek a declaratory judgment by this Court declaring the rights of the parties and the public as to the issues raised in Paragraph 23 above; and all other just and proper relief to which they may be entitled.

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By /s/ Karen J. Garnett
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STUART JACKSON (92154)
Attorneys for Defendant/Cross
Claimants George O. Jernigan, Jr.
and the Democratic Party of
Arkansas

[Filed Jun 18, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

ANSWER TO AMENDED COMPLAINT

For their Answer to the Plaintiff's Amended Complaint, Defendants/Intervenors Arkansans For Governmental Reform, Inc., *et al.* ("AGR") states:

1. AGR denies the allegations set forth in Paragraphs one and two of said Amended Complaint.
2. AGR admits the allegations set forth in Paragraphs, three, four, five, six, seven and eight.
3. With respect to paragraph nine, AGR denies that the Plaintiffs's Amended Complaint states a cause of action cognizable under the Declaratory Judgment Act, Ark. Code Ann. Sections 16-111-101 through -111 (1987). AGR admits that venue is proper in this honorable Court.
4. AGR admits the allegations set forth in paragraph 10.
5. AGR denies the allegations set forth in paragraphs 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 and COUNT I (also numbered paragraph 15), COUNT II (also numbered paragraph 16), COUNT III (also numbered paragraph 17) and COUNT IV (also numbered paragraph 18).
6. By way of affirmative defense, AGR states that all "status" arguments, that is, the retroactive or prospec-

tive application of Amendment 73, are premature because no plaintiff or defendant is or has been presently affected, adversely or otherwise, by the Amendment or its application. Plaintiffs are asking this Court to render an advisory opinion on the application of Amendment 73 to hypothetical situations. The "status" application of Amendment 73 will become real and immediate under only two circumstances: an incumbent is denied ballot access because of prior service or a challenger objects to granting ballot access to an incumbent whose prior service would disqualify him (or her) if Amendment 73 were retroactively applied. In other words, a justiciable "status" issue can arise only after the appropriate ballot access authority has denied ballot access because of prior service or is hailed into court by a challenger for granting ballot access in spite of prior service that would prevent ballot access if Amendment 73 were applied retroactively. AGR is fully aware that there may be some discomfort and uncertainty in settling the "status" issue as described above; however, that discomfort and uncertainty in no way mandate or justify this Court's rendition of an advisory opinion on the issue.

7. Pleading further, AGR states that the Amended Complaint fails to state a cause of action under the Declaratory Judgement Act upon which this Court can grant relief on the severability or the enacting clause allegations. Nothing in the language of the Act nor in the Arkansas Supreme Court's interpretations and applications of the Act provides a jurisdiction basis for an action to strike from the Constitution of Arkansas an amendment approved by the voters.

WHEREFORE, AGR demands judgment against Plaintiffs dismissing their Amended Complaint and denying them any relief thereunder, and awarding AGR such other relief as the Court deems proper.

**ARKANSANS FOR GOVERNMENTAL REFORM,
INC., et al.**

By /s/ James F. Lane
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Arkansas Bar No. 75075
Attorney for AGR
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501/227-8416

CLETA DEATHERAGE MITCHELL
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[Filed Jun 18, 1993]

**IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION**

(Title Omitted in Printing)

**ANSWER OF INTERVENOR-DEFENDANT
U.S. TERM LIMITS, INC.**

Intervenor-defendants U.S. Term Limits, Inc., Frank Gilbert, Greg Rice, Lon Schultz, and Spencer Plumley (hereinafter collectively "USTL"), through undersigned counsel, hereby answer plaintiff's Amended Complaint, based upon knowledge, information and belief, as follows:

1. USTL lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1 and, on that basis, denies the allegations, except that USTL admits that plaintiff Hill purports to bring this action on behalf of the listed persons, associations, and entities.

2. USTL lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 2 and, on that basis, denies the allegations.

3. USTL admits the allegations of paragraph 3.

4. USTL admits that Dale Bumpers and David Pryor are United States Senators from Arkansas and that the persons listed in the second sentence of paragraph 4 are Representatives of former United States Representatives from Arkansas.

5. USTL admits that the persons listed in paragraph 5 are State Senators or former State Senators.

6. USTL admits that the persons listed in paragraph 6 are State Representatives or former State Representatives.

7. USTL admits the allegations of paragraph 7.

8. USTL admits the allegations of paragraph 8.

9. USTL admits that plaintiff purports to seek a declaratory judgment, but denies that plaintiff's prayer for relief seeks a declaratory judgment with regard to her purported political and constitutional rights to advocate, to contribute to the election of, and to vote for candidates for election to anything but the Arkansas Congressional Delegation without regard to the prior incumbency of any such candidates in any such offices. USTL admits the remaining allegations of paragraph 9.

10. USTL admits the allegations of paragraph 10.

11. USTL states that the Amendment speaks for itself and refers the Court to the Amendment for its terms.

12. USTL states that the Amendment speaks for itself and refers the Court to the Amendment for its terms.

13. Paragraph 12 states a legal conclusion to which USTL need not respond. To the extent a response is necessary, USTL denies the allegations of paragraph 13.

14. USTL denies the allegations of the first sentence of paragraph 14, and in response to the second sentence states that the Amendment speaks for itself and refers the Court to the Amendment for its terms. USTL denies the practical effect of the Amendment is to impose a substantive qualification for election to federal offices.

15. USTL denies the allegations of paragraph 15.

16. USTL lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16 and, on that basis, denies the allegations.

17. USTL lacks knowledge or information sufficient to form a belief as to the allegations of paragraph 17 and, on that basis, denies the allegations.

18. USTL lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 18 and, on that basis, denies the allegations.

19. USTL lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 19 and, on that basis, denies the allegations.

20. Paragraph 15 (Count I) states a legal conclusion to which USTL need not respond. To the extent a response is required, USTL denies the allegations of paragraph 15.

21. Paragraph 16 (Count II) states a legal conclusion to which USTL need not respond. To the extent a response is required, USTL denies the allegations of paragraph 16.

22. Paragraph 17 (Count III) states a legal conclusion to which USTL need not respond. To the extent a response is required, USTL denies the allegations of paragraph 17.

23. Paragraph 18 (Count IV) states a legal conclusion to which USTL need not respond. To the extent a response is required, USTL denies the allegations of paragraph 18.

24. Paragraph 19 (Count V) consists principally of legal argument to which USTL need not respond. To the extent paragraph 19 contains factual allegations, they are denied.

25. In response to the first sentence of paragraph 20 (Count VI), USTL states that the Petition speaks for itself and refers the Court to the Petition for its terms. USTL is without knowledge or information sufficient to form a belief as to the truth of the allegations of the second sentence and on that basis denies the allegations of the second sentence. The third sentence states a legal conclusion to which USTL need not respond; to the extent a response is necessary, the allegation is denied.

26. USTL denies that plaintiff is entitled to any of the relief sought in her prayer for relief.

27. All allegations not expressly admitted are denied.

FIRST AFFIRMATIVE DEFENSE

To the extent that plaintiff's claim is premised upon the supposed significance of the alleged absence of an Enacting Clause, plaintiff's Complaint is barred by waiver and laches.

Respectfully submitted,

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WILLIAMS & CONNOLLY

By: /s/ Terrence O'Donnell
JOHN G. KESTER
TERRENCE O'DONNELL
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*Attorneys for U.S. Term
Limits, Inc., et al.*

June 17, 1993

[Filed Jun 18, 1993]

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS SECOND DIVISION

(Title Omitted in Printing)

ANSWER TO AMENDED COMPLAINT

Comes the State of Arkansas Ex. Rel. Attorney General Winston Bryant, Intervenor, by its counsel, and for its Answer to the Amended Complaint, states:

1. As to Paragraph 1 of the Complaint (references to Paragraphs are to the corresponding paragraphs of the Amended Complaint), it is without information as to the allegations and denies same.

2. As to Paragraph 2, it is without information and denies same.

3. It admits Paragraph 3.

4. It admits Paragraph 4.

5. It admits Paragraph 5.

6. It admits Paragraph 6.

7. It admits Paragraph 7.

8. It admits Paragraph 8.

9. As to Paragraph 9, it admits that Plaintiffs seek declaratory relief pursuant to A.C.A. § 16-11-101 *et seq.* (1987), but denies that any rights alleged therein are presently affected. It admits venue.

10. It admits Paragraph 10.

11. As to Paragraph 11, the popular name and ballot title speak for themselves, and no response is required.

12. As to Paragraph 12, the language of the petition immediately following the ballot title speaks for itself, and no response is required.

13. As to Paragraph 13, a conclusion is stated, and it denies such conclusion.

14. It denies Paragraph 14.

15. It has no information as to Paragraph 16 and denies same.

16. It has no information as to Paragraph 16 and denies same.

17. As to Paragraph 17, it admits that Congressman Thornton has served three terms in the U.S. House of Representatives. It has no information with regard to all other allegations of Paragraph 17 and denies same.

18. As to Paragraph 18, it is without information and denies same.

19. As to Paragraph 19, it is without information and denies same.

20. It denies second Paragraph 15.

21. It denies second Paragraph 16.

22. It denies second Paragraph 17.

23. It denies second Paragraph 18.

24. It denies second Paragraph 19.

25. It denies Paragraph 20.

22. It denies all allegations of the Amended Complaint not specifically admitted.

WHEREFORE, the State prays that:

A. The Complaint be dismissed.

B. It be awarded its costs and all proper relief to which it proves itself entitled.

STATE OF ARKANSAS
Ex Rel. Winston Bryant
Attorney General

By: /s/ Richard F. Hatfield
RICHARD F. HATFIELD
RICHARD F. HATFIELD, P.A.
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[Filed June 18, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

**ANSWER AND CROSS-COMPLAINT OF
RAY THORNTON TO AMENDED COMPLAINT**

Congressman Ray Thornton, for his answer to Plaintiffs' Amended Complaint (the "Complaint"), states and alleges that:

1. Defendant lacks sufficient knowledge and information to admit or deny the allegations contained in Paragraph 1 of the Complaint.
2. Defendant upon information and belief admits the allegations contained in Paragraph 2 of the Complaint.
3. Defendant admits the allegations contained in Paragraph 3 of the Complaint.
4. Defendant admits the allegations contained in Paragraph 4 of the Complaint.
5. Defendant admits the allegations contained in Paragraph 5 of the Complaint.
6. Defendant admits the allegations contained in Paragraph 6 of the Complaint, except those allegations pertaining to Hoye D. Horn and Water M. Day who are deceased.
7. Defendant admits the allegations contained in Paragraph 7 of the Complaint.

8. Defendant admits the allegations contained in Paragraph 8 of the Complaint.

9. Defendant admits that this Court has jurisdiction and that venue is proper as alleged in Paragraph 9 of the Complaint.

10. Defendant admits the allegations contained in Paragraph 10 of the Complaint.

11. Defendant admits the allegations contained in Paragraph 11 of the Complaint.

12. Defendant admits the allegations contained in Paragraph 12 of the Complaint.

13. Defendant admits the allegations contained in Paragraphs 13 and 14 of the Complaint.

14. Defendant upon information and belief admits the allegations contained in Paragraph 15.

15. Defendant upon information and belief admits that plaintiff Dick Herget as well as other citizens of the Second Congressional District of Arkansas support his reelection to the United States House of Representatives from that District. Defendant admits that on November 6, 1992, he sent for filing a Federal Elections Commission Statement of Candidacy through the Office of the Clerk, U.S. House of Representatives declaring that he was seeking reelection to Congress in the 1994 elections, and that a number of citizens of the Second District have made and are making contributions to the 1994 campaign as reflected by public records on file with the Federal Election Commission and the office of the Secretary of State.

16. Defendant admits that he previously served three terms in the U.S. House of Representatives from 1973 to 1979 representing the Fourth District of Arkansas and one term, in addition to the current term, from 1991 to present representing the Second District of Arkansas. Under the provisions of the challenged Amendment, Defendant and his supporters lack sufficient knowledge and

information regarding their political and constitutional rights and the legality of the Defendant's candidacy for the office of U.S. Representative.

17. Defendant lacks sufficient knowledge and information to admit or deny the allegations contained in Paragraphs 18 and 19 of the Complaint.

COUNT I

(QUALIFICATIONS CLAUSE)

18. Defendant admits the allegations contained in Paragraph 15 (sic) of the Complaint.

COUNT II

(RIGHT OF ASSOCIATION)

19. Upon information and belief Defendant admits the allegations contained in Paragraph 16 (sic) of the Complaint.

COUNT III

(REPUBLICAN FORM OF GOVERNMENT)

20. Upon information and belief Defendant admits the allegations contained in Paragraph 17 (sic) of the Complaint.

COUNT IV

(SUPREMACY CLAUSE)

21. Defendant admits the allegations contained in Paragraph 18 (sic) of the Complaint.

COUNT V

(SEVERABILITY)

22. Defendant admits the allegations contained in Paragraph 19 (sic) of the Complaint.

COUNT VI

(ENACTING CLAUSE)

23. Defendant admits the allegations contained in Paragraph 20 of the Complaint.

WHEREFORE, Defendant Ray Thornton prays that this Court grant to him all just and proper relief to which he may be entitled.

AMENDED CROSS-COMPLAINT FOR DECLATORY JUDGMENT

Pursuant to the provisions of A.C.A. § 16-111-101 *et seq.* (1987), Defendant/Cross-claimant Thornton seeks a declaratory judgment with regard to his political and constitutional rights and the legality of his actions as a U.S. Representative under the provisions of the challenged Amendment.

24. Defendant/Cross-claimant Thornton realleges all of his Admissions of the allegations set forth in Paragraphs 2 through 21 of the Complaint.

25. Further, Defendant/Cross-claimant Thornton asserts these claims for a declaratory judgment against the Arkansas "constitutional" Officers named in Paragraph 3 of the Complaint. As members of the Executive Department, these cross-defendants are the state officials upon whom the responsibility falls for execution and enforcement of the provisions of the Amendment.

26. On November 18, 1992, Defendant/Cross-claimant Thornton filed a Statement of Candidacy (the "Statement") through the Office of the Clerk, U.S. House of Representatives. In that Statement, Defendant/Cross-claimant Thornton declared that he was seeking the congressional seat in the Second District of Arkansas in the 1994 election.

27. Defendant/Cross-claimant Thornton has accepted campaign contributions from voters in the Second Congressional District for his 1994 campaign for Congress.

28. Defendant/Cross-claimant Thornton seeks a declaration determining the rights of the parties as they affect the legality of his candidacy for and subsequent service as a member of the U.S. Congress and the legality of any actions by the Cross-Defendants to interpret and enforce the terms and provisions of the Act so as to preclude Defendant/Cross-claimant Thornton from seeking to appear on the ballot for another term beyond the current one which ends in January, 1995. Specifically, Defendant/Cross-claimant Thornton seeks a declaration of rights with regard to the following:

- a. Under the Amendment when does one begin counting terms toward the limit on terms of service?
 - i) Does the Amendment not count any terms served prior to January 1, 1993, toward the maximum allowable Terms?
 - ii) Does the term to which the member was elected in the November 3, 1992, general election (service of which did not begin until on or after January 1, 1993) count toward the maximum?
 - iii) Is non-consecutive service or service from different districts in the U.S. House of Representatives counted toward the maximum allowable terms?
- b. Does Section 3 of the Amendment violate the federal Constitution by imposing an additional qualification on the election of, or the eligibility for a ballot position for, U.S. Representatives or U.S. Senators from Arkansas?

WHEREFORE, Defendant/Cross-claimant Thornton seeks a Declaratory Judgment by this Court declaring the rights of the parties and the public as to the issues raised in Paragraph 28 above; and all other just and proper relief to which he may be entitled.

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By /s/ Sherry P. Bartley
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Attorneys for United States
Congressman Ray Thornton

[Filed June 18, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

**ANSWER OF BLANCHE LAMBERT
TO AMENDED COMPLAINT**

Congresswoman Blanche Lambert, for her answer to Plaintiffs' Amended Complaint (the "Complaint"), states and alleges that:

1. Defendant lacks sufficient knowledge and information to admit or deny the allegations contained in Paragraph 1 of the Complaint.
2. Defendant lacks sufficient knowledge and information to admit or deny the allegations contained in Paragraph 2 of the Complaint.
3. Defendant admits the allegations contained in Paragraph 3 of the Complaint.
4. Defendant admits the allegations contained in Paragraph 4 of the Complaint.
5. Defendant admits the allegations contained in Paragraph 5 of the Complaint.
6. Defendant admits the allegations contained in Paragraph 6 of the Complaint, except those allegations pertaining to Hoya D. Horn and Walter M. Day who are deceased.
7. Defendant admits the allegations contained in Paragraph 7 of the Complaint.

8. Defendant admits the allegations contained in Paragraph 8 of the Complaint.

9. Defendant admits that this Court has jurisdiction and that venue is proper as alleged in Paragraph 9 of the Complaint.

10. Defendant admits the allegations contained in Paragraph 10 of the Complaint.

11. Defendant admits the allegations contained in Paragraph 11 of the Complaint.

12. Defendant admits the allegations contained in Paragraph 12 of the Complaint.

13. Defendant admits the allegations contained in Paragraphs 13 and 14 of the Complaint.

14. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraphs 15, 16, 17, 18 and 19.

COUNT I

(QUALIFICATIONS CLAUSE)

15. Defendant admits the allegations contained in Paragraph 15 (sic) of the Complaint.

COUNT II

(RIGHT OF ASSOCIATION)

16. Upon information and belief Defendant admits the allegations contained in Paragraph 16 (sic) of the Complaint.

COUNT III

(REPUBLICAN FORM OF GOVERNMENT)

17. Upon information and belief Defendant admits the allegations contained in Paragraph 17 (sic) of the Complaint.

COUNT IV
(SUPREMACY CLAUSE)

18. Defendant admits the allegations contained in Paragraph 18 (sic) of the Complaint.

COUNT V
(SEVERABILITY)

19. Defendant admits the allegations contained in Paragraph 19 (sic) of the Complaint.

COUNT VI
(ENACTING CLAUSE)

20. Defendant admits the allegations contained in Paragraph 20 of the Complaint.

WHEREFORE, Defendant Blanche Lambert prays that this Court grant to her all just and proper relief to which she may be entitled.

MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD
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By /s/ Sherry P. Bartley
SHERRY P. BARTLEY
Bar No. 79009

Attorneys for United States
Congresswoman Blanche Lambert

[Filed Jun. 18, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

ANSWER

Come now the Defendants, The Republican Party of Arkansas, Asa Hutchinson and Tim Hutchinson, by and through their attorney, Doyle L. Webb, II, and for their Answer to the Amended Complaint filed by the Plaintiffs herein, allege and state:

1. Defendants are without sufficient information to admit the allegations contained in Plaintiffs' Amended Complaint paragraph 1 and they therefore deny each and every material allegation contained therein.

2. Defendants are without sufficient information to admit the allegations contained in Plaintiffs' Amended Complaint paragraph 2 and they therefore deny each and every material allegation contained therein.

3. Defendants admit the allegations contained in Plaintiffs' Amended Complaint paragraphs 3, 4, 5, 6, 7 and 8.

4. Defendants deny the allegations contained in Plaintiffs' Amended Complaint paragraph 9.

5. Defendants admit the allegations contained in Plaintiffs' Amended Complaint paragraphs 10, 11 and 12.

6. Defendants deny the allegations contained in Plaintiffs' Amended Complaint paragraphs 13, 14, 15 and 16.

7. Defendants admit that Congressman Thornton previously served three terms in the United States House of

Representatives but deny all other allegations contained in Plaintiffs' Amended Complaint paragraph 17 not specifically admitted herein.

8. Defendants are without sufficient information to admit the allegations contained in Plaintiffs' Amended Complaint paragraph 18 and they therefore deny each and every material allegation contained therein.

9. Defendants admit that John Dawson previously served seven terms in addition to his current term in the State House of Representatives, but deny all other allegations contained in Plaintiffs' Amended Complaint paragraph 19 not specifically admitted herein.

10. Defendants deny the allegations contained in Plaintiffs' Amended Complaint Count I. paragraph 15, Count II. paragraph 16, Count III. paragraph 17, Count IV. paragraph 18, Count V. paragraph 19 and Count VI. paragraph 20.

THEREFORE, the Defendants, The Republican Party of Arkansas, Asa Hutchinson and Tim Hutchinson, request that the Amended Complaint filed by the Plaintiffs be denied and dismissed; for their attorneys fees and costs; and for all other just and proper relief to which they may be entitled.

WEBB & DOERPINGHAUS
Attorneys at Law
507 Oak Hill Road
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(501) 778-9322

/s/ Doyle L. Webb, II
DOYLE L. WEBB, II
Arkansas Bar No. 82-175

[Filed Jun. 22, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

ORDER

On the 7th day of June, 1993, a hearing was held in this matter. Based upon the pleadings, arguments and comments of counsel at that hearing the Court finds as follows:

1. The record reflects that upon the filing of the Amended Complaint on behalf of the Plaintiffs, former Governor Bill Clinton is no longer a party to this action and this Motion to Dismiss is therefore moot.

2. After consideration of the Motion to Intervene filed on behalf of United States Term Limits, Inc., Frank Gilbert, George Rice, Lon Schultz and Spencer Plumley and the Motion to Intervene of Americans for Term Limits and Steve Goss, the Court finds that the Motions to Intervene should be granted pursuant to Arkansas Rule of Civil Procedure 24(b).

3. Pursuant to Rule 16 of the Arkansas Rules of Civil Procedure and in order to secure the just, speedy and inexpensive determination of this action, the following schedule shall govern these proceedings.

A. All answers to the Amended Complaint and any cross-claims or counterclaims shall be filed on or before June 18, 1993. All answers or replies to any cross-claims or counterclaims shall be filed on or before June 25, 1993.

B. All motions for summary judgment or motions to dismiss based upon matters of law and/or material facts to which there is no genuine dispute shall be filed on or before July 9, 1993 and the hearing of said motions, if any, is hereby scheduled for July 29, 1993, at 1:30 p.m.

C. The period during which the parties may conduct discovery shall terminate on August 25, 1993.

D. That within the foregoing period, but not later than August 10, 1993, the parties shall disclose to opposing counsel a list of exhibits to be presented at trial of this matter and a list of all persons to be called as lay or expert witnesses at trial with a brief statement of the subject matter upon which each expert witness is expected to testify.

E. This matter is hereby set for trial to the Court on September 8, 1993.

Ordered this 18th day of June, 1993.

/s/ Chris Piazza
Circuit Judge

[Filed Jun. 30, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

ANSWER

Come now the Defendants, The Republican Party of Arkansas, Asa Hutchinson and Tim Hutchinson, by and through their attorney, Doyle L. Webb, II, and for their Answer to the Cross-Complaint filed by George O. Jernigan and the Democratic Party of Arkansas, allege and state:

1. That Defendants admit the allegations contained in paragraph 20 of the Cross-Complaint except that they deny those allegations set forth in paragraphs 9, 13 and second paragraphs 15, 16, 17, 18, 19 and 20.

2. That Defendants deny each and every material allegation contained in the Cross-Complaint paragraphs 21, 22 and 23.

THEREFORE, the Defendants, The Republican Party of Arkansas, Asa Hutchinson and Tim Hutchinson, request that the Cross-Complaint filed by the George O. Jernigan and the Democratic Party of Arkansas be denied and dismissed; for their attorneys fees and costs; and for all other just and proper relief to which they may be entitled.

WEBB & DOERPINGHAUS
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/s/Doyle L. Webb, II
DOYLE L. WEBB, II
Arkansas Bar No. 82-175

[Filed July 9, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

**U.S. TERM LIMITS, INC. ET AL.'S MOTION FOR
SUMMARY JUDGMENT UNDER COUNTS ONE
THROUGH FOUR OF THE AMENDED COMPLAINT**

Pursuant to Ark. R. Civ. P. 56(c), defendant-intervenor U.S. Term Limits, Inc., Frank Gilbert, Greg Rice, Lon Schultz, and Spencer Plumley ("USTL"), through undersigned counsel, hereby respectfully move the Court for an Order granting summary judgment in favor of USTL on Counts One through Four of plaintiffs' Amended Complaint. The grounds for the Motion are set forth in the accompanying Memorandum.

A proposed Order is being filed herewith.

Respectfully submitted,

ALLEN LAW FIRM

By: /s/ H. William Allen
H. WILLIAM ALLEN
950 Centre Place
212 Center Street
Little Rock, AR 72201
(501) 374-7100

WILLIAMS & CONNOLLY

By: /s/ Terrence O'Donnell
JOHN G. KESTER
TERRENCE O'DONNELL
DENNIS M. BLACK
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725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5000

*Attorneys for U.S. Term
Limits, Inc., et al.*

July 9, 1993

[Filed July 9, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

MOTION FOR SUMMARY JUDGMENT

Come now Plaintiffs, Bobbie Hill, individually, and on behalf of the League of Women Voters and on behalf of all others similarly situated, and Dick Herget individually, and on behalf of all others similarly situated, and for their Motion for Summary Judgment pursuant to Rule 56 of the Arkansas Rules of Civil Procedure, states:

1. The material facts of the case are undisputed, and the Plaintiffs are entitled to judgment as a matter of law.
2. The Arkansas Term Limitation Amendment ("Amendment") is void and unenforceable for lack of an Enacting Clause.
3. The Amendment adds additional qualifications to Article I, Sections 2 and 3 of the United States Constitution.
4. The Amendment unnecessarily burdens First and Fourteenth Amendment freedoms of association and expression and the right to vote.
5. The Amendment is inherently non-severable.
6. A Brief in Support of this Motion for Summary Judgment is filed contemporaneously herewith.
7. Exhibits in Support of this Motion for Summary Judgment are attached hereto and incorporated by reference.

WHEREFORE, Plaintiffs, Bobbie Hill, individually and on behalf of the League of Women Voters of Arkansas and on behalf of all other similarly situated, and Dick Herget, individually and on behalf of all other similarly situated, pray that summary judgment be granted in their favor upon all claims set forth in the Amended Complaint, and for all other proper relief to which they may be entitled.

HERSCHEL H. FRIDAY

ELIZABETH J. ROBBEN
ROBERT S. SHAFER
JEFFREY H. MOORE
FRIDAY, ELDREDGE & CLARK
400 West Capitol, Suite 2000
Little Rock, Arkansas 72201
(501) 376-2011

Attorneys for Plaintiffs

By: /s/ Elizabeth J. Robben
ELIZABETH J. ROBBEN
Bar No. 79244

PLAINTIFF'S EXHIBIT 1

AFFIDAVIT OF BOBBIE E. HILL

STATE OF ARKANSAS)
) ss.
 COUNTY OF OUACHITA)

Before me, the undersigned personally appeared the Affiant being personally well known to me or satisfactorily made known to me and under oath, stated as follows:

1. My name is Bobbie E. Hill. I am over the age of eighteen (18) and competent to testify as to the matters contained herein. This affidavit is given in support of Plaintiffs' Motion for Summary Judgment in the case of *Hill v. Tucker*, in the Circuit Court of Pulaski County, Arkansas, Case No. 92-6171.

2. I am a United States citizen and a citizen resident taxpayer and registered voter of the State of Arkansas.

3. I bring this action individually and on behalf of all other citizens, residents, taxpayers and registered voters similarly situated and also on behalf of the League of Women Voters of Arkansas ("League").

4. The League is an Arkansas non-profit corporation with approximately seven hundred (700) active members throughout the state. I am a member and Director of the United States League. I am a former president of the Arkansas League and currently Co-President of my local League chapter.

5. I reside within the 38th Legislative District for the Arkansas House of Representatives. John Dawson is the representative for my legislative district to the State House of Representatives.

6. John Dawson previously served seven (7) terms in the State House of Representatives. It is my understanding that John Dawson will run for re-election in 1994

by first seeking the Democratic nomination in the Democratic primary.

7. The Arkansas Term Limitation Amendment states that it is applicable to all those seeking office after January 1, 1993. I believe this would include John Dawson. The Amendment prohibits a person having previously served as a member of the State House of Representatives from serving more than three (3) terms. Consequently, the existence of the Amendment threatens my ability as an individual to campaign for, raise money for, contribute to, associate with, support, and otherwise promote John Dawson as the representative to the Arkansas State House of Representatives for the 38th Legislative District. But for the application of the amendment, I plan, desire and hope to re-elect John Dawson, the Democratic Party nominee and, if successful, the representative from my district to the State House of Representatives.

8. The Arkansas Term Limitation Amendment could not have passed without the affirmative vote of persons outside the 38th Legislative District. Because John Dawson previously served seven (7) terms, the people outside my district have wrongly determined that he is not paying attention to his duties and not serving his constituency. On the contrary, John Dawson has served his district well as evidenced in part by his seven (7) successful re-election campaigns.

FURTHER AFFIANT SAYETH NOT.

/s/ Bobbie E. Hill
 BOBBIE E. HILL
 Affiant

SUBSCRIBED AND SWORN TO before me, a Notary Public, on this 7th day of July, 1992.

/s/ Katrin Jones
 NOTARY PUBLIC

My Commission Expires: Feb. 21, 2001

PLAINTIFF'S EXHIBIT 2

AFFIDAVIT OF DICK HERGET

Comes Dick Herget and states the following under oath:

1. My name is Dick Herget. I am over the age of 18 and competent to testify as to matters contained herein. My Affidavit is given in support of plaintiff's Motion for Summary Judgment in the case of *Hill v. Tucker, et al.*, in the Circuit Court of Pulaski County, Arkansas, Case No. 92-6171.

2. I am a United States citizen and a citizen resident, tax payer and registered voter in the Second Congressional District of the State of Arkansas.

3. I am a lifelong supporter of the Democratic party in the State of Arkansas. In the past, I have actively supported, contributed, and campaigned for democratic candidates for State and Federal offices in the State of Arkansas. For the 1992 campaign, I was finance chairman for the candidacy of Congressman Ray Thornton. In that capacity and as a supporter of Ray Thornton's, I solicited funds and urged other voters to vote for Ray Thornton both in his bid to become the democratic nominee for U.S. Congressman for the Second Congressional District of Arkansas and in the general election.

4. It is my desire that Ray Thornton be the democratic nominee for the Second Congressional District Election in 1994. It is further my desire and goal that Congressman Thornton be reelected in the general election in November of 1994. To that end, I intend to campaign and seek contributions for Congressman Thornton's reelection as the democratic nominee. I intend to vote for him and urge others to do so. To achieve the goal of his reelection, it is my desire that his name appear on the ballot of both the democratic primary in 1994 and on the general ballot.

FURTHER AFFIANT SAYETH NOT.

/s/ Dick Herget
DICK HERGET

STATE OF ARKANSAS)
) ss
COUNTY OF)

I, Dick Herget, having been duly sworn, state that I have reviewed the contents of the foregoing and find that the statements contained therein are true and correct to the best of my knowledge and belief.

/s/ Dick Herget
DICK HERGET

SUBSCRIBED AND SWORN to before me, a Notary Public, on this 7th day July, 1993.

/s/ Pat A. Glover
Notary Public

My Commission Expires: April 6, 1999

PLAINTIFF'S EXHIBIT 3

STATE OF ARKANSAS

SECRETARY OF STATE

W. J. "Bill" McCuen
Secretary of State

To All to Whom These Presents Shall Come, Greetings:

I, Bill McCuen, Secretary of State of the State of Arkansas, do hereby certify that the following and hereto attached instrument of writing is a true and perfect copy of

THE TEXT OF

CONSTITUTIONAL AMENDMENT NUMBER 73
AS ENACTED IN THE 1992 GENERAL ELECTION

In Testimony Whereof, I have hereunto set my hand and affixed my official Seal. Done at office in the City of Little Rock, this 8th day of July 1993.

/s/ Bill McCuen
Secretary of State

STATE OF ARKANSAS

SECRETARY OF STATE

State Capitol

Little Rock, Arkansas 72201-1094

[SEAL]

W. J. "Bill" McCuen
Secretary of State

CONSTITUTIONAL AMENDMENT NUMBER 73

(Proposed by Petition of the People)

(Popular Name)

ARKANSAS TERM LIMITATION AMENDMENT
(Ballot Title)

AN AMENDMENT TO THE CONSTITUTION OF THE STATE OF ARKANSAS LIMITING THE NUMBER OF TERMS THAT MAY BE SERVED BY THE ELECTED OFFICIALS OF THE EXECUTIVE DEPARTMENT OF THIS STATE TO TWO (2) FOUR YEAR TERMS, THIS DEPARTMENT TO CONSIST OF A GOVERNOR, LIEUTENANT GOVERNOR, SECRETARY OF STATE, TREASURER OF STATE, AUDITOR OF STATE, ATTORNEY GENERAL, COMMISSIONER OF STATE LANDS; LIMITING THE NUMBER OF TERMS THAT MAY BE SERVED BY MEMBERS OF THE ARKANSAS HOUSE OF REPRESENTATIVES TO THREE (3) TWO-YEAR TERMS, THESE MEMBERS TO BE CHOSEN EVERY SECOND YEAR; LIMITING THE NUMBER OF TERMS THAT MAY BE SERVED BY MEMBERS OF THE ARKANSAS SENATE TO TWO (2) FOUR-YEAR TERMS, THESE MEMBERS TO BE CHOSEN EVERY FOUR YEARS; PROVIDING THAT ANY PERSON HAVING BEEN ELECTED TO THREE (3) OR MORE TERMS AS A MEMBER OF THE UNITED STATES HOUSE OF REPRESENTATIVES

FROM ARKANSAS SHALL NOT BE ELIGIBLE TO APPEAR ON THE BALLOT FOR ELECTION TO THE UNITED STATES HOUSE OF REPRESENTATIVES FROM ARKANSAS; PROVIDING THAT ANY PERSON HAVING BEEN ELECTED TO TWO (2) OR MORE TERMS AS A MEMBER OF THE UNITED STATES SENATE FROM ARKANSAS SHALL NOT BE ELIGIBLE TO APPEAR ON THE BALLOT FOR ELECTION TO THE UNITED STATES SENATE FROM ARKANSAS; PROVIDING FOR AN EFFECTIVE DATE OF JANUARY 1, 1993; AND MAKING THE PROVISIONS APPLICABLE TO ALL PERSONS THEREAFTER SEEKING ELECTION TO THE SPECIFIED OFFICES.

(Text)

SUMMARY:

This amendment provides a limit of two (2) terms for Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General and Commissioner of State Lands. It provides a limit of three (3) terms for State Representatives, and a limit of two (2) terms for State Senators. It also provides that persons having been elected three (3) or more terms as a member of the United States House of Representatives from Arkansas shall not be eligible to appear on the ballot for election to the United States House of Representatives from Arkansas. Lastly, it provides that any person having been elected to two (2) or more terms as a member of the United States Senate from Arkansas shall not be eligible to appear on the ballot for election to the United States Senate from Arkansas.

PREAMBLE:

The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives

of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of elected officials.

SECTION 1—Executive Branch

(a) The Executive Department of this State shall consist of a Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, all of whom shall keep their offices at the seat of government, and hold their offices for the term of four years, and until their successors are elected and qualified.

(b) No elected officials of the Executive Department of this State may serve in the same office more than two such four year terms.

SECTION 2—Legislative Branch

(a) The Arkansas House of Representatives shall consist of members to be chosen every second year by the qualified electors of the several counties. No member of the Arkansas House of Representatives may serve more than three such two year terms.

(b) The Arkansas Senate shall consist of members to be chosen every four years by the qualified electors of the several districts. No member of the Arkansas Senate may serve more than two such four year terms.

SECTION 3—Congressional Delegation

(a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas.

(b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas.

SECTION 4—Severability.

The provisions of this Amendment are severable, and if any should be held invalid, the remainder shall stand.

SECTION 5—Provisions Self-Executing

Provisions of this Amendment shall be self-executing.

SECTION 6—Application

(a) This Amendment to the Arkansas Constitution shall take effect and be in operation on January 1, 1993, and its provisions shall be applicable to all persons thereafter seeking election to the offices specified in this Amendment.

(b) All laws and constitutional provisions which conflict with this Amendment are hereby repealed to the extent that they conflict with this amendment.

PLAINTIFF'S EXHIBIT 6

AFFIDAVIT OF CONGRESSMAN RAY THORNTON

Ray Thornton, being first duly sworn, deposes and says:

1. I am a citizen of the State of Arkansas and a resident of The Second Congressional District of Arkansas. I am presently the Congressman for the Second District of Arkansas. In addition to my present term which began in January, 1993, I represented the Second District in the U.S. House of Representatives from January, 1991 to the beginning of my present term.

2. Prior to my representation of the Second District, I previously served three (3) terms in the U.S. House of Representatives from 1973 to 1979 representing the Fourth District of Arkansas.

3. On November 6, 1992, I sent for filing a Federal Elections Commission Statement of Candidacy through the Office of the Clerk, U.S. House of Representatives declaring my candidacy for the congressional seat in the Second District of Arkansas in the 1994 election thereby expressing my intent and desire to seek reelection to Congress in 1994 as the representative for the Second District and to seek the Democratic nomination for this office in the 1994 Democratic Primary.

4. I have sought election as a Democratic candidate for public office for twenty-three (23) years. It is my belief based upon my experience that my ability to be re-elected as Congressman depends on my ability to have my name on the Democratic primary ballot and, if successful in the primary, on the general election ballot.

/s/ Ray Thornton
RAY THORNTON

Subscribed and sworn to before me this 9th day of July, 1993.

/s/ Barbara J. McBryde

My Commission Expires: Jan. 4, 2000

AMENDMENT NUMBER 4

ARKANSAS 1992 GENERAL ELECTION
ARKANSAS TERM LIMITATION AMENDMENT

County	For Votes	%	Against Votes	%	Total Votes
ARKANSAS	3,921	51.35	3,715	48.65	7,636
ASHLEY	4,143	60.03	2,758	39.97	6,901
BAXTER	9,618	72.17	3,708	27.83	13,326
BENTON	32,379	76.59	9,894	23.41	42,273
BOONE	8,395	65.69	4,385	34.31	12,780
BRADLEY	2,205	51.78	2,053	48.22	4,258
CALHOUN	1,406	59.32	964	40.68	2,370
CARROLL	6,185	74.77	2,087	25.23	8,272
CHICOT	2,362	52.35	2,150	47.65	4,512
CLARK	4,463	52.33	4,066	47.67	8,529
CLAY	2,974	53.00	2,637	47.00	5,611
CLEBURNE	5,666	60.64	3,677	39.36	9,343
CLEVELAND	1,610	51.82	1,497	48.18	3,107
COLUMBIA	4,608	64.19	2,571	35.81	7,179
CONWAY	4,362	56.75	3,325	43.25	7,687
CRAIGHEAD	11,304	55.83	8,942	44.17	20,246
CRAWFORD	10,242	64.13	5,728	35.87	15,970
CRITTENDEN	7,027	67.45	3,391	32.55	10,418
CROSS	3,652	56.74	2,784	43.26	6,436
DALLAS	2,120	55.77	1,681	44.23	3,801
DESHA	1,897	46.85	2,152	53.15	4,049
DREW	3,206	57.81	2,340	42.19	5,546
FAULKNER	10,195	56.76	7,768	43.24	17,963
FRANKLIN	3,735	56.91	2,828	43.09	6,563
FULTON	2,555	60.29	1,683	39.71	4,238
GARLAND	19,036	62.15	11,591	37.85	30,627
GRANT	3,386	55.32	2,735	44.68	6,121
GREENE	6,650	55.56	5,320	44.44	11,970
HEMPSTEAD	5,141	66.05	2,643	33.95	7,784
HOT SPRING	5,589	51.53	5,258	48.47	10,847
HOWARD	2,724	59.08	1,887	40.92	4,611
INDEPENDENCE	6,293	54.01	5,359	45.99	11,652
IZARD	2,913	55.90	2,298	44.10	5,211

County	For Votes	%	Against Votes	%	Total Votes
JACKSON	3,615	53.68	3,119	46.32	6,734
JEFFERSON	11,029	53.37	9,637	46.63	20,666
JOHNSON	3,970	54.62	3,299	45.38	7,269
LAFAYETTE	2,336	66.23	1,191	33.77	3,527
LAWRENCE	3,652	54.47	3,053	45.53	6,705
LEE	2,072	49.44	2,119	50.56	4,191
LINCOLN	2,115	53.33	1,851	46.67	3,966
LITTLE RIVER	3,291	62.09	2,009	37.91	5,300
LOGAN	4,720	57.07	3,550	42.93	8,270
LONOKE	8,361	59.86	5,607	40.14	13,968
MADISON	2,979	61.33	1,878	38.67	4,857
MARION	3,540	71.54	1,408	28.46	4,948
MILLER	10,249	74.02	3,598	25.98	13,847
MISSISSIPPI	9,038	62.41	5,443	37.59	14,481
MONROE	1,886	48.76	1,982	51.24	3,868
MONTGOMERY	2,233	62.44	1,343	37.56	3,576
NEVADA	1,976	55.33	1,595	44.67	3,571
NEWTON	2,360	64.64	1,291	35.36	3,651
OUACHITA	6,478	53.97	5,526	46.03	12,004
PERRY	1,761	52.84	1,572	47.16	3,333
PHILLIPS	3,877	49.37	3,976	50.63	7,853
PIKE	2,197	58.76	1,542	41.24	3,739
POINSETT	4,425	53.83	3,795	46.17	8,220
POLK	4,041	61.08	2,575	38.92	6,616
POPE	10,792	61.72	6,694	38.28	17,486
PRAIRIE	1,803	47.15	2,021	52.85	3,824
PULASKI	57,750	56.95	43,661	43.05	101,411
RANDOLPH	2,889	53.52	2,509	46.48	5,398
SALINE	16,491	61.32	10,403	38.68	26,894
SCOTT	2,538	59.76	1,709	40.24	4,247
SEARCY	2,000	61.50	1,252	38.50	3,252
SEBASTIAN	24,255	63.33	14,043	36.67	38,298
SEVIER	2,746	56.76	2,092	43.24	4,838
SHARP	4,383	63.59	2,510	36.41	6,893
ST. FRANCIS	5,445	59.18	3,755	40.82	9,200
STONE	2,399	57.38	1,782	42.62	4,181
UNION	7,893	57.75	5,775	42.25	13,668
VAN BUREN	4,023	58.04	2,908	41.96	6,931
WASHINGTON	27,529	62.43	16,569	37.57	44,098

County	For Votes	%	Against Votes	%	Total Votes
WHITE	11,883	55.89	9,380	44.11	21,263
WOODRUFF	1,450	47.42	1,608	52.58	3,058
YELL	3,894	53.90	3,331	46.10	7,225
COUNT: 75					
TOTAL:	494,326		330,836		825,162
AVERAGE:		59.91		40.09	

[Filed July 9, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

**DEFENDANT/CROSS-CLAIMANT RAY THORNTON'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendant/Cross-claimant Ray Thornton, pursuant to Ark. R. Civ. P. 56, for his motion for partial summary judgment states:

1. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Ark. R. Civ. P. 56(c).

2. Section 3 of the Arkansas Term Limits Amendment is invalid because it places additional qualifications for United States Senators and Representatives not found in Article I, Sections 2 and 3 of the United States Constitution.

3. In support of this motion, defendant/cross-claimant Ray Thornton adopts and herein incorporates by reference the arguments and case law contained in Section II of Plaintiffs' Brief in Support of Motion for Summary Judgment filed July 9, 1993.

WHEREFORE, defendant/cross-claimant prays that this Court declare that Section 3 of the Arkansas Term Limitation Amendment is invalid for adding additional qualifications to the United States Constitution.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, A PROFESSIONAL
LIMITED COMPANY
320 West Capitol Avenue, Suite 1000
Little Rock, Arkansas 72201
(501) 688-8800

By /s/ Sherry P. Bartley
SHERRY P. BARTLEY
Bar No. 79009

Attorneys for Ray Thornton

One Hundredth Congress, Senate Document No. 100-34
Second Session

BIOGRAPHICAL DIRECTORY
OF THE
UNITED STATES CONGRESS

1774-1989

BICENTENNIAL EDITION

* * * *

United States
Government Printing Office
1989

* * * *

[522] ALFORD, Thomas Dale, a Representative from Arkansas: born in New Hope, Pike County, near Murfreesboro, Ark., January 23, 1916; attended the public schools of Rector, Ark., Arkansas State College at Jonesboro, State Teachers College at Conway, and graduated from the University of Arkansas School of Medicine at Little Rock; postgraduate training at the University of Illinois in Chicago; during the Second World War served in the United States Army Medical Corps with service at the Army and Navy Hospital, Hot Springs, Ark., 1941-1943, and in the European Theater 1943-45; private practice of medicine at Atlanta, Ga., 1946-1948, and taught at Emory University College of Medicine, 1947-1948; in 1948 returned to Little Rock, Ark., and continued the practice of medicine; member of active teaching faculty, University of Arkansas School of Medicine, 1948-1958; member of Little Rock Board of Education, 1955-1958; delegate, Democratic National Convention, 1960; elected as an Independent Democrat, a write-in

candidate in the Eighty-sixth and Eighty-seventh Congresses January 1, 1959-January 1, 1963); was not a candidate for reelection in 1962 to the Eighty-eighth Congress but was unsuccessful for the Democratic gubernatorial nomination; resumed practice of opthalmic surgery; member of faculty, University of Arkansas School of Medicine; is a resident of Little Rock, Ark.

* * * *

Congressional Quarterly's
GUIDE TO U.S. ELECTIONS
Second Edition

* * * *

1958 House Elections

Candidates	Votes	%
[992] ARKANSAS		
1 Ezekiel C. Gathings (D)		100.0
2 Wilbur D. Mills (D)		100.0
3 James W. Trimble (D)		100.0
4 Oren Harris (D)		100.0
5 Dale Alford (Write In)	30,739	51.0
Brooks Hays (D)	29,483	49.0
6 William F. Norrell (D)		100.0

* * * *

One Hundredth Congress, Senate Document No. 100-34
Second Session

BIOGRAPHICAL DIRECTORY

OF THE

UNITED STATES CONGRESS

1774-1989

BICENTENNIAL EDITION

* * * *

United States
Government Printing Office
1989

* * * *

[1939] THURMOND, James Strom, a Senator from South Carolina born in Edgefield, S.C. December 5, 1902; attended the public schools; graduated, Clemson College, 1923; taught in South Carolina high schools 1923-1929; Edgefield County superintendent of education 1929-1933; studied law and was admitted to the South Carolina bar in 1930; city and county attorney 1930-1938; member, State senate 1933-1938; circuit judge 1938-1942; served in the United States Army 1942-1946, in Europe and in the Pacific; major general, United States Army Reserve; again circuit judge, but resigned in May 1946; Governor of South Carolina 1947-1951; unsuccessful States Rights candidate for President of the United States in 1948; unsuccessful candidate for the Democratic nomination for United States Senator in 1950; practiced law in Aiken, S.C., 1951-1955; appointed as a Democrat to the United States Senate to complete the term of Charles E. Daniel, who resigned, and served from December 24, 1954, to January 3, 1955; had been previously elected as a write-in candidate in November 1954 for the

term commencing January 3, 1955, and ending January 3, 1961, but due to a promise made to the voters in the 1954 election, he resigned as of April 4, 1956; again elected as a Democrat in November 1956 to fill the vacancy caused by his own resignation and served from November 7, 1956, to January 1, 1961; reelected in 1960, 1966, 1972, 1978, and again in 1984, for the term ending January 3, 1991; changed from the Democratic to the Republican Party in 1964; President pro tempore of the Senate during the Ninety-seventh through the Ninety-ninth Congresses; chairman, Committee on the Judiciary Ninety-seventh through Ninety-ninth Congress.

* * * *

Congressional Quarterly's

GUIDE TO U.S. ELECTIONS

Second Edition

* * * *

	Candidates	Votes	%
[630]	SOUTH CAROLINA		
	* * * *		
1942	Burnet R. Maybank (D)	23,356	100.0
1948	Burnet R. Maybank (D)	135,998	96.5
1954	Strom Thurmond (Write In)	143,442	63.1
	Edgar A. Brown (D)	83,525	36.8

Special Election

1956	Strom Thurmond (D)	245,371	100.0
1960	Strom Thurmond (D)	330,164	100.0
1966	Strom Thurmond (R)	271,297	62.2
	Bradley Morrah (D)	164,955	37.8
1972	Strom Thurmond (R)	415,806	63.3
	Eugene N. Zeigler (D)	241,056	36.7
1978	Strom Thurmond (R)	351,733	55.6
	Charles D. Ravenel (D)	281,119	44.4
1984	Strom Thurmond (R)	644,815	66.8
	Melvin Purvis Jr. (R)	306,982	31.8

* * * *

One Hundredth Congress, Senate Document No. 100-34
Second Session

BIOGRAPHICAL DIRECTORY

OF THE

UNITED STATES CONGRESS

1774-1989

BICENTENNIAL EDITION

* * * *

United States
Government Printing Office
1989

* * * *

[1819] SKEEN, Joseph Richard, a Representative from New Mexico; born in Roswell, Chaves County, N.Mex., June 30, 1927; attended public and parochial schools; graduated from O'Dea High School, Seattle, Wash., 1944; B.S., Texas A&M University, College Station, 1950; served in the United States Navy, 1945-1946, and United States Air Force Reserve, 1949-1952; engineer, 1951; businessman, 1952-1960; served in the New Mexico senate, 1960-1970; chairman, New Mexico Republican Party, 1962-1965; delegate, New Mexico State Republican conventions, 1960-1970; delegate, Republican National Convention, 1964; won as a write-in candidate in 1980 election to the United States House of Representatives after the courts denied him a position on the ballot; elected as a Republican to the Ninety-seventh and to the three succeeding Congresses (January 3, 1981-January 3, 1989); is a resident of Picacno, N.Mex.

* * * *

Congressional Quarterly's
GUIDE TO U.S. ELECTIONS

Second Edition

* * * *

Popular Returns 1980

* * * *

[1049] NEW MEXICO

Candidates	Votes	%
1 Manuel Lujan Jr. (R)	125,910	51.0
Bill Richardson (D)	120,903	49.0
2 Joe Skeen (WRITE IN)	61,564	38.0
David King (D)	55,085	34.0
Dorothy Runnels (WRITE IN)	45,343	28.0

* * * *

Congressional Quarterly's
GUIDE TO U.S. ELECTIONS

Second Edition

* * * *

1982 House Elections

* * * *

Candidates Votes %

[1052] CALIFORNIA

* * * *

43 Ron Packard (R WRITE-IN)	66,444	36.8
Roy (Pat) Archer (D)	57,995	32.1
Jonnie R. Crean (R)	56,297	31.1

* * * *

Michael Davidson
Counsel

Ken U. Benjamin, Jr.
Deputy Counsel

Morgan J. Frankel
Claire M. Sylvia
Assistant Counsel

Phone: (202) 224-4435
Telecopier: (202) 224-3391

UNITED STATES SENATE

OFFICE OF SENATE LEGAL COUNSEL
Washington, DC 20510-7250

July 27, 1993

Ms. Jacquetta Alexander
Circuit Clerk
Pulaski County Courthouse, Room 200
Markham and Spring Streets
Little Rock, AR 72201

Re: *Bobbie E. Hill v. Jim Guy Tucker*, Pulaski
County Circuit No. 92-6171

Dear Ms. Alexander:

As we have communicated previously, we are representing Senator Dale Bumpers, who was named as a defendant in this case because of his office as a United States Senator. We filed an answer to the complaint on Senator Bumpers' behalf on February 23, 1993. Subsequently, we filed a memorandum styled Memorandum of Defendant Senator Dale Bumpers on Limited Status in Case, seeking to be excused from participating, through briefing and counsel's attendance at hearings, in proceedings in this case. The memorandum noted that Senator Bumpers had not filed any motions nor requested any affirmative relief in this matter.

Since the filing of our answer on behalf of Senator Bumpers, the plaintiffs, on June 2, 1993, amended their complaint. The purpose of this letter is to explain to the

Court and to the parties why, consistent with Senator Bumpers' intention to leave the filing of pleadings and motions to the other parties in this action, we have not filed an answer to the amended complaint.

As it touches upon Senator Bumpers, the amended complaint restates the assertions and claim of the initial complaint. The amended complaint added one plaintiff and dropped a number of defendants. The factual assertions in the amended complaint are similar to those contained in the original complaint, except the amended complaint includes five paragraphs (§§ 15-19) describing the plaintiffs' plans to work to reelect a Member of the U.S. House of Representatives and a Member of the Arkansas House of Representatives, and those Representatives' intention to seek reelection in 1994, but for the Term Limitation Amendment. These paragraphs do not relate to Senator Bumpers, whose present term as a Member of the United States Senate runs until January 3, 1999.

The amended complaint also adds three new claims (Counts II-IV, at §§ 16-18), which do not relate with any particularity to Senator Bumpers. The only claim relating directly to Senator Bumpers is Count I, at § 15, which states the qualifications for election as a United States Senator or Representative and alleges that the Term Limitation Amendment unconstitutionally seeks to impose an additional qualification for those offices, which is beyond the power of the State of Arkansas to do. This claim is identical to § 14 of the original complaint. In his answer to the original complaint, Senator Bumpers stated that he "Admits the allegations contained in Paragraph 14 of the Complaint, except that the people of Arkansas, in common with the people of the other several states, may seek to alter the qualifications to be a United States Representative or United States Senator enumerated in the United States Constitution through the exclusive amendatory procedures prescribed in Article V of

the United States Constitution." Answer at ¶ 14. Senator Bumpers took no position with regard to other issues presented in the complaint. *Id.* at ¶¶ 12, 15, 16.

In line with the intention expressed in his memorandum on his limited status, Senator Bumpers respectfully wishes to stand upon his answer and not file a formal answer to the amended complaint or to any of the various cross-pleadings filed by other parties, which also do not relate directly to Senator Bumpers. Of course, if the Court is of the view that a formal answer to the amended complaint or to any cross-pleadings is necessary for the completion of the record in this case, we will proceed to file them.

Thank you for your assistance in communicating Senator Bumpers' intention to Judge Piazza.

Sincerely,

/s/ Michael Davidson
MICHAEL DAVIDSON

cc: all counsel

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

HEARING

BE IT REMEMBERED, that on the 7th day of September 1993 before the HONORABLE CHRIS PIAZZA, the above-styled matter came on for hearing, with counsel appearing as follows:

APPEARANCES:

MS. ELIZABETH J. ROBBEN, Esq., and MR. JEFFREY H. MOORE, Esq., Friday, Eldredge & Clark, 2000 First Commercial Bank Building, Little Rock, Arkansas 72201
* * * On Behalf of the Plaintiffs * * *

* * * * *

[17] THE COURT: Ms. Robben.

MS. ROBBEN: Thank you, Your Honor. . . .

[20] I would like to go onto something I thought we had also wound up at the last hearing, whether it was in your Conclusions of Law or your rulings from the bench, which I think most of the people here were present for, that you declined to realign the parties or dismiss defendants who are not asking to be dismissed. As we stated then and as the pleadings are clear, Bobbie Hill brings this on her behalf individually and on behalf of the League of Women Voters who are interested in challenging term limits. They are not a party, but they are supporting her in these efforts. They have never been officially a party to these actions. . . .

* * * * *

[Filed Sept. 14, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

NOTICE OF APPEAL

U.S. Term Limits, Inc., Frank Gilbert, Greg Rice, Lon Schultz, and Spencer Plumley, intervenor-defendants herein, hereby appeal, pursuant to Ark. Sup. Ct. R. 1-2 (a)(1), to the Supreme Court of Arkansas from the Findings of Fact, Conclusions of Law and Final Order of this Court dated September 8, 1993 and all rulings incorporated therein by reference. The record on appeal consists of all transcripts and all pleadings and other documents filed in this Court and also those filed in this matter during the time it was removed to the United States District Court for the Eastern District of Arkansas No. LR-C-93-157 on that Court's docket). All transcripts of all proceedings have been ordered.

WILLIAMS & CONNOLLY

By: /s/ John G. Kester
JOHN G. KESTER
TERRENCE O'DONNELL
DENNIS M. BLACK
TIMOTHY D. ZICK
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5000

ALLEN LAW FIRM

By: /s/ H. William Allen
H. WILLIAM ALLEN
950 Centre Place
212 Center Street
Little Rock, Arkansas 72201
(501) 374-7100

*Attorneys for U.S. Term
Limits, Inc., Frank Gilbert,
Greg Rice, Lon Schultz, and
Spencer Plumley*

September 14, 1993

[Filed Sept. 30, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

NOTICE OF APPEAL AND DESIGNATION OF RECORD

Comes now the Intervenor/Defendants, The Republican Party of Arkansas, Asa Hutchinson and Tim Hutchinson, by and through their attorneys, WEBB DOERPINGHAUS BROWN, and hereby give notice that they appeal to the Supreme Court of Arkansas from the final order, styled "Findings of Fact, Conclusions of Law and Final Order" in favor of the Plaintiffs against the Intervenor/Defendants, which was entered on September 8, 1993.

This appeal is taken to the Supreme Court pursuant to Supreme Court Rule 1-2(a)(1), in that it involves the interpretation of the Arkansas Constitution.

The Intervenor/Defendants hereby designate the entire record and all proceedings, exhibits, evidence and testimony.

The transcript designated above has been ordered from Lane Hinson, whose address is Suite 371, 201 West Third Street, Little Rock, Arkansas, 72201, and who was the reporter of the proceedings in this case.

DATED this 29th day of September, 1993.

WEBB DOERPINGHAUS BROWN
Attorneys for Appellants
507 Oak Hill Road
Benton, Arkansas 72015
(501) 778-9322

By: /s/ Doyle L. Webb, II
DOYLE L. WEBB, II

[Filed Oct. 7, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

**NOTICE OF APPEAL, DESIGNATION OF RECORD
AND
STATEMENT OF POINTS TO BE RELIED UPON**

Come now Intervenor/Defendants/Appellants, Americans for Term Limits and Steve Goss, by their attorneys, John T. Harmon & Associates, P.A., and hereby gives Notice of Appeal to the Arkansas Supreme Court from the Findings of Fact, Conclusions of Law and Final Order of this Court dated September 8, 1993, and all rulings incorporated therein by reference. The record on appeal consists of all transcripts and all pleadings and other documents filed in this Court and also those filed in this matter during the time it was removed to the United States District Court for the Eastern District of Arkansas (No. LR-C-93-157 on that Court's docket). All transcripts of all proceedings have been ordered by other appellants.

Intervenor/Defendants/Appellants certify that the within Notice of Appeal is meritorious and is not given for purposes of delay, but solely in the interests of justice.

AMERICANS FOR TERM LIMITS
and STEVE GOSS

By: /s/ William L. Wharton
WILLIAM L. WHARTON—
#79137
JOHN T. HARMON & ASSOC.,
P.A.
Attorneys for Americans for
Term Limits and Steve Goss
600 Edgewood Drive
Maumelle, AR 72113
(501 851-1258)

[Filed Oct. 7, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

NOTICE OF CROSS-APPEAL

COME NOW Plaintiffs Bobbie Hill, Individually and on behalf of The League of Women Voters and All Others Similarly Situated and Dick Herget, Individually and on behalf of all others Similarly Situated, by and through their attorneys of record and for their Notice of Cross-Appeal state as follows:

1. Plaintiffs hereby cross-appeal from the Final Order entered of record on September 8, 1993 including the Conclusions of Law filed by the Court on July 29, 1993, incorporated word for word into the Final Order;

2. Plaintiffs note and rely upon the filing of a notice of appeal by Intervenor/Defendants, The Republican Party of Arkansas, Asa Hutchinson and Tim Hutchinson, filed on September 30, 1993, designating the entire record;

Respectfully submitted,

HERSCHEL H. FRIDAY
ELIZABETH J. ROBBEN
ROBERT S. SHAFER
JEFFREY H. MOORE
FRIDAY, ELDRIDGE & CLARK
400 West Capitol Ave., Suite 2000
Little Rock, Arkansas 72201
(501) 376-2011

Attorneys for Plaintiffs

By: /s/ Jeffrey H. Moore
JEFFREY H. MOORE

[Filed Oct. 8, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

NOTICE OF APPEAL AND DESIGNATION OF RECORD

Defendants George O. Jernigan, Jr. ("Jernigan") and the Democratic Party of Arkansas ("Party") hereby give notice that they appeal to the Supreme Court of Arkansas from that portion of the judgment entered September 8, 1993 in the captioned case dismissing their cross-complaint.

Jurisdiction over the appeal is in the Supreme Court pursuant to Rule 1-2(a)(1) of the Rules of the Supreme Court of Arkansas, in that the appeal presents questions of interpretation of the Constitution of Arkansas.

Defendants Jernigan and the Party designate the entire record and all proceedings, exhibits, evidence and testimony. The designated transcript has been ordered by The Republican Party of Arkansas, Asa Hutchinson and Tim Hutchinson, according to their Notice of Appeal filed on September 30, 1993.

Jernigan and the Party file this appeal solely for the purpose of preserving the issues presented in their cross-complaint. In the event the Supreme Court finds that any portion of Amendment 73 is valid, the cross-complaint of Jernigan and the Party will no longer be moot, and the issues presented in the cross-complaint should be decided so that Jernigan and the Party might discharge

their legal duty to conduct primary elections and certify nominees for general elections.

WRIGHT, LINDSEY & JENNINGS
2200 Worthen Bank Building
200 West Capitol Avenue
Little Rock, Arkansas 72201-3699
(501) 371-0808

By /s/ Karen J. Garnett
NANCY BELLHOUSE MAY
KAREN J. GARNETT

Attorneys for
George O. Jernigan, Jr. and
the Democratic Party of Arkansas

[Filed Oct. 8, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

NOTICE OF APPEAL AND DESIGNATION OF RECORD

Comes Arkansans for Governmental Reform, Inc., an Intervenor, and hereby gives notice that it appeals to the Supreme Court of Arkansas pursuant to Arkansas Supreme Court Rule 1-2(a)(1) from the Findings of Fact, Conclusions of Law and Final Order of this Court dated September, 8, 1993 and all rulings incorporated therein by reference.

Intervenor hereby designates the entire record as the record on appeal. All transcripts of all proceedings have been ordered.

Respectfully submitted,

MACKEY & WILLS, P.A.
401 W. Capitol, Suite 555
Little Rock, AR 72201

By: /s/ Frank J. Wills, III
FRANK J. WILLS, III

[Filed Oct. 25, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

NOTICE OF APPEAL AND DESIGNATION OF RECORD

U.S. Term Limits, Inc., Frank Gilbert, Greg Rice, Lon Schultz, and Spencer Plumley, intervenor-defendants herein, file this Notice of Appeal and Designation of Record, pursuant to Ark. R. App. P. 4(c). U.S. Term Limits, Inc., *et al.* hereby appeal, pursuant to Ark. Sup. Ct. R. 1-2(a)(1), to the Supreme Court of Arkansas from the Findings of Fact, Conclusions of Law and Final Order of this Court dated September 8, 1993 and all rulings incorporated therein by reference.

* * * *

Pursuant to Arkansas Rule of Appellate Procedure 3(g), U.S. Term Limits, Inc., *et al.* hereby state the following points upon which they intend to rely in this appeal:

1. The Circuit Court of Pulaski County lacked jurisdiction to decide the sufficiency of the initiative petition for Amendment 73;
2. The sufficiency of an initiative petition cannot be challenged after the question has been submitted to and voted upon by the people;
3. An initiative petition for a constitutional amendment need not comply with the enacting clause requirement of Amendment 7 to the Arkansas constitution;

4. Ballot-access restrictions do not create new qualifications for federal offices, but rather are "time, place and manner" regulations specifically authorized by Article I, § 4, of the Constitution of the United States; and

5. Nothing in the Constitution of the United States precludes the states or their people from establishing qualifications for the offices of United States Representative or United States Senator that are not unreasonable and not inconsistent with the qualifications already prescribed in the Constitution.

WILLIAMS & CONNOLLY

By: /s/ John G. Kester
JOHN G. KESTER
TERRENCE O'DONNELL
DENNIS M. BLACK
TIMOTHY D. ZICK

725 12th Street, N.W.
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ALLEN LAW FIRM

By: /s/ H. William Allen
by Sandra Jackson, Esq.
H. WILLIAM ALLEN
950 Centre Place
212 Center Street
Little Rock, Arkansas 72201
(501) 374-7100

*Attorneys for U.S. Term
Limits, Inc., Frank Gilbert,
Greg Rice, Lon Schultz,
and Spencer Plumley*

October 25, 1993

[Filed Oct. 26, 1993]

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

(Title Omitted in Printing)

NOTICE OF APPEAL AND DESIGNATION OF RECORD

Comes the State of Arkansas Ex Rel. Attorney General Winston Bryant, Intervenor/Defendant, and hereby gives notice that it appeals to the Supreme Court of Arkansas pursuant to Arkansas Supreme Court Rule 1-2 (a)(1) from the Findings of Fact, Conclusions of Law and Final Order of this Court dated September 8, 1993, and all rulings incorporated therein by reference. This appeal presents questions of interpretation of the Constitution of Arkansas.

The State designates the entire record, including pleadings and transcripts of all hearings, as the record on appeal. The State relies on the fact that transcripts of all proceedings and all pleadings have been ordered by the Republican Party, Asa Hutchinson and Tim Hutchinson and "Unified Defendants", Bearden, et al. appealing this Court's order.

Respectfully submitted,

STATE OF ARKANSAS
Ex Rel. Winston Bryant
Attorney General

By: /s/ Richard F. Hatfield
RICHARD F. HATFIELD
RICHARD F. HATFIELD, P.A.
401 West Capitol, Suite 502
Little Rock, AR 72201
(501) 374-9010

[EXHIBITS]

1. Massachusetts Resolve of Nov. 19, 1788, ch. 49:

Resolve for organizing the Federal Government.
November 19, 1788.

Resolved, That the Commonwealth be divided into eight districts, for the purpose of choosing eight persons to represent the people thereof, in the Congress of the United States, each district to choose one Representative, who shall be an inhabitant of such district, and that the districts be as follows, viz. . . .

Virginia Act of Nov. 20, 1788, ch. II:

*An ACT for the Election of REPRESENTATIVES
pursuant to the Constitution of Government
of the United States.*

[Passed the 20th of NOVEMBER, 1788.]

SECTION I. . . . WHEREAS, it is provided by the said Constitution, that until the enumeration therein directed shall be taken, *Virginia* shall be entitled to ten Members in the House of Representatives, and that the times, places, and manner of holding elections for the same, shall be prescribed by the Legislature: *BE it therefore enacted by the General Assembly*, . . .

SECT II. THAT the persons qualified by law to vote for members to the House of Delegates, in each county composing a district, shall assemble at their respective county court-houses on the second day in *February* next, and then and there vote for some discreet and proper person, being a freeholder, and who shall have been a *bona fide* resident for twelve months within such district, as a member to the House of Representatives for the United States. . . .

New Jersey Act of November 21, 1788, ch. 241:

An ACT for carrying into Effect, on the Part of the State of New Jersey, the Constitution of the United States,

assented to, ratified and confirmed by this State, on the eighteenth Day of December, in the Year of our LORD One Thousand Seven Hundred and Eighty-seven.

WHEREAS, the good People of this State, on the said eighteenth Day of December, in and by a Convention of Delegates chosen by the Citizens thereof, agreeably to an Act of the Legislature for that Purpose made and provided, did, on the Part of this State assent to, ratify and confirm, a Constitution for the United States, agreed to and recommended, in the Name of the People of the United States, by the unanimous Consent of the said United States in Convention assembled at Philadelphia on the seventeenth Day of September, in the said Year of our LORD One Thousand Seven Hundred and Eighty-seven: AND WHEREAS, in and by the said Constitution, it is, among other Things, provided and directed, . . .

That the Times, Places and Manner, of holding Elections for Senator, and Representatives shall be prescribed in each State by the Legislature thereof . . .

Sect. I. BE IT ENACTED by the Council and General Assembly of this State, and it is hereby Enacted by the Authority of the same, That it shall and may be lawful for every Inhabitant of this State, who is or shall be qualified to vote for Members of the State Legislature, to nominate four Candidates to the Choice of the People, as Representatives in the said Congress of the United States, by writing on one Ticket or Piece of Paper the Names of four Persons to be voted for as Representatives, which said Ticket or Piece of Paper shall be subscribed by the Person nominating with the Date of doing the same, and that at any Time at least thirty Days previous to the Day of Election of said Representatives, delivering the said Ticket or Piece of Paper so subscribed and dated to the Clerk of the Court of Common Pleas of the County in which such Inhabitant may reside, which Clerk is hereby directed and required to receive and carefully to file the same, provided it be delivered within the Time aforesaid.

2. *And be it Enacted by the Authority aforesaid, That each and every Clerk of the Court of Common Pleas in the respective Counties of this State is, and hereby are directed and required, at the Expence of the State, twenty-four Days previous to the Day of Election of the said Representatives, to transmit, by a careful and trusty Person, a true Copy of all and every such Nomination as shall be delivered to him as aforesaid to the Governor of this State for the Time being, who is hereby directed and required, at least eighteen Days previous to the said Day of Election for Representatives, to cause the same to be published in the News-Papers printed in this State, and in two or more printed in the cities of New-York and Philadelphia; and also to transmit a true List of the Names of every Candidate so returned to him as aforesaid to each and every Sheriff of the respective Counties in this State, who is hereby required immediately to put up, in at least five of the most publick Places in his County, a true List of the Names of the said Candidates.*

3. *And be it further Enacted by the Authority aforesaid, That the Persons so nominated, and whose Names shall be transmitted to the several Sheriffs as aforesaid, shall exclusively be the Candidates from whom four Representatives shall be voted for in each of the Counties of this State; and that no Person whatever shall be set up as a Candidate on the said Day of Election, but the Persons so nominated and returned as aforesaid. . . .*

Maryland Act of Dec. 22, 1788, ch. 10:

An ACT directing the time, places and manner, of holding elections for representatives of this state in the congress of the United States, and for appointing electors on the part of this state for choosing a president and vice-president of the United States, and for the regulation of the said elections. . . .

II. BE IT ENACTED, by the General Assembly of Maryland, That for the purpose of choosing representatives in

the congress of the United States, this state be divided into six districts, which shall be numbered from one to six; that Saint-Mary's, Charles, and Calvert counties, compose the first district; Kent, Talbot, Cecil and Queen-Anne's, the second; Anne-Arundel, including the city of Annapolis, and Prince-George's, the third; Baltimore, including the town of Baltimore, and Harford, the fourth; Somerset, Dorchester, Worcester and Caroline, the fifth; and Frederick, Washington and Montgomery, the sixth district. . . .

VII. AND BE IT ENACTED, That every person coming to vote for representatives for this state in the congress of the United States, shall have a right to vote for six persons, one whereof shall be a resident of each of the said districts, and the candidate in each district having the greatest number of votes of all the candidates residing in that district, shall be declared to be duly elected for that district. . . .

XIII. AND BE IT ENACTED, That if a vacancy or vacancies shall happen in the representation of this state in the house of representatives in the congress of the United States, by death, resignation, disqualification, or otherwise, the governor and council shall issue writs of election to the several counties in this state, the city of Annapolis and Baltimore-town, to fill such vacancy or vacancies by an election of a representative or representatives residing in the district or districts where such vacancy or vacancies shall happen, in the manner herein before prescribed. . . .

Georgia Act of Jan. 23, 1789, p. 247:

An Act For appointing the times, manner and places for representatives in Congress.

In order on the part of this State to carry into effect the Constitution of the United States of America. Be it enacted by the freemen of the State of Georgia in general Assembly met and it is hereby enacted by the authority

of the same that the elections in this State for members of the House of Representatives in Congress of the United States shall be held in the manner following, that is to say, this State shall be and is hereby declared to be divided into three districts [T]he manner of electing three members for Representatives of the State shall be, that every man shall ballot three persons, one subj. of which shall be a resident of three years standing in the district such constituent resides in; and the other two persons to be balloted for by such voter shall be residents of like standing of the other two separate districts: that is to say, there shall be one candidate balloted for by every voter who is an inhabitant of each separate district so that each district in the State may be properly, impartially and effectively represented. . . .

North Carolina Act of Dec. 16, 1789, ch. 1:

An Act directing the Manner of electing Representatives to represent this State in Congress.

I. BE it enacted by the General Assembly of the State of North-Carolina, and it is hereby enacted by the authority of the same, That until an actual census be made, this state shall be divided and laid off into five divisions: . . . each of which divisions shall be entitled to elect and send one Representative to the Legislature of the United States; and the person elected in each division shall be a resident or inhabitant of the division for which he is elected, during the space or term of one year before, and at the time of election. . . .

Virginia Act of December 26, 1792, ch. 1:

An ACT for arranging the Counties of this Commonwealth into Districts to choose Representatives to Congress. . . .

SEC. II. AND be it further enacted, That the persons qualified by law to vote for members to the House of Delegates in each county and corporation composing a

district, shall assemble at their respective county court-houses, on the third Monday in March next, and also on the third Monday in March in every second year thereafter, and then and there vote for some discreet and proper person, being a freeholder and resident within such district, as a member of the House of Representatives for the United States.

Tennessee Act of Aug. 3, 1796, ch. 1:

An ACT directing the mode of electing one representative to represent this State in the Congress of the United States. . . .

Sec. 2. Be it enacted, That the person elected shall have been a citizen or resident of this state, three years next immediately preceding the day of election: *Provided*, That this shall not be construed to extend to any person who was a citizen or resident of this state at the time of making the constitution thereof.

IN THE
SUPREME COURT OF ARKANSAS

No. 93-1240

U.S. TERM LIMITS, INC., *et al.*,
Appellants,

v.

BOBBIE E. HILL, *et al.*,
Appellees.

On Appeal from the Circuit Court
of Pulaski County
Honorable Chris Piazza, J.

AFFIDAVIT OF JAMES S. FAY

STATE OF CALIFORNIA)
COUNTY OF ALAMEDA) ss.:

James S. Fay, being first duly sworn, deposes and says:

1. I am Professor of Political Science at California State University, Hayward. I have held this appointment since 1970. I have also taught Election Law on the adjunct faculties of the University of California Hastings College of Law, and the University of San Francisco School of Law.

2. I hold the bachelor of arts degree from Georgetown University, a masters degree in political science from the

New School for Social Research, a Ph.D. in political science from the University of Michigan, and a J.D. from the University of California Hastings College of Law. I have published many articles regarding campaigns, elections, and election law and was the editor of the first six editions of the *California Almanac* from 1984 to 1993. A listing of my publications and other facts about my background are contained in my curriculum vitae, which is attached hereto as Exhibit A. I have studied political campaigns and electoral behavior throughout my 23 years as a professor.

3. I have reviewed Amendment 73 to the Constitution of Arkansas and documentation concerning prior write-in candidacies.

4. It is my conclusion based on my years of professional study of the election process in the United States that, although a write-in candidacy is more difficult to win than one in which a candidate's name is on the ballot, it is far from impossible for a write-in candidate to win, especially if the write-in candidate has substantial name identification. This is no less true under Amendment 73 than in other write-in procedures. Members of the U.S. House of Representatives who have served 6 years, and Senators who have served 12 years, almost invariably have high name identification among their constituents.

5. Most write-in candidacies in the past have been waged by fringe candidates, with little public support and extremely low name identification. In instances when write-in candidates have been well known, however, they often have been successful. For example, there have been at least six successful modern write-in candidacies for Congress.

a. Dale Alford twice won election by write-in to the United States House of Representatives in Little Rock, Arkansas. In 1958 he defeated the regular Democratic nominee, Brooks Hays, whose name was on the ballot, by a tally of 30,739 votes to 29,483 votes. In 1960 he

ran again and defeated L. J. Churchill, whose name was on the ballot, by 57,617 write-in votes to 12,054 votes.

b. Charles Curry was elected to the House when he received 53.7 percent of the vote in California's third district in 1930.

c. In 1954, Strom Thurmond was elected to the United States Senate from South Carolina. He defeated the regular Democratic nominee, Edgar A. Brown, by a vote of 143,444 write-ins to 83,525 votes for Mr. Brown, whose name was printed on the ballot.

d. In 1980, Joseph R. Skeen of New Mexico defeated the regular Democratic nominee, David W. King, and secured a seat in the House of Representatives. Although King was the only candidate whose name was on the ballot, Skeen received 61,564 write-in votes to 55,085 votes for King. A third candidate, Dorothy Runnels, received 45,343 write-in votes, meaning that almost twice as many write-in votes were cast than the number of votes for the only candidate on the ballot.

e. In 1982, Ron Packard of California won a write-in campaign for the House, defeating both the Democratic and Republican nominees, both of whose names were printed on the ballot. The vote was 66,444 write-ins for Packard, 57,995 votes for the Democratic nominee, Roy Archer, and 56,297 votes for the Republican nominee, Johnnie R. Crean.

6. In addition to these successful candidates for Congress, several presidential candidates with substantial name recognition have won statewide primaries through write-in candidacies. For example, in 1992 Ross Perot won the Democratic primary in North Dakota through a write-in candidacy. In 1968, Lyndon Johnson won the New Hampshire Democratic primary by write-ins. In 1964, Henry Cabot Lodge won the New Hampshire Republican primary through write-ins. And in 1960 John F. Kennedy won the Illinois, Massachusetts, and Pennsyl-

vania Democratic primaries, and Richard Nixon won the Massachusetts and Nebraska Republican primaries through write-in candidacies. Between 1916 and 1956 there were 21 other instances in which a write-in candidate won a Democratic or Republican presidential primary.

7. In addition, there have been at least five candidates elected to state legislatures in the past 20 years through write-in votes. Those include: Dan Burleson in West Virginia in 1974, Richard Harper in Kansas in 1978, Ernie Chambers in Nebraska in 1988, Jack Stump in Virginia in 1989, and Mark W. Dailey in Rhode Island in 1990.

8. These successful write-in candidacies demonstrate that when a write-in candidate is well-known and well-funded, it is quite possible for him or her to win an election.

9. Incumbent Members of Congress enjoy many advantages in seeking re-election. Those advantages would make it much easier for a long-term incumbent to wage a write-in candidacy than it would be for a political unknown. Someone as well known as Congressman Ray Thornton, for example, would not face the difficulties faced by the vast majority of write-in candidates. To the best of my knowledge, other than Dale Alford who twice won write-in candidacies, only one incumbent Congressman ever has run for re-election as a write-in. That was Philip J. Philbin from Massachusetts in 1970. He was defeated in his party primary, but decided to run as a write-in candidate and received a substantial share—26.7 percent—of the vote.

10. The typical write-in incumbent almost certainly will have a higher name recognition, more sophisticated campaign skills, ongoing endorsements from political allies and newspapers, a well-honed talent for working the media, the good will of constituents, and a much larger campaign fund than the non-incumbents on the ballot. The need for voters to remember the name and

necessary information to write-in on a ballot is easily satisfied by an intelligently run write-in campaign. Given a choice, any rational candidate would prefer to be a well-known incumbent write-in candidate rather than a political novice who happens to have his or her name printed on the ballot.

/s/ James S. Fay
JAMES S. FAY

Subscribed and sworn to before me this 9th day of February 1994:

Timothy G. Gannon
Notary Public—California
Alameda County
Comm. Expires Jan. 3, 1997

[Filed Feb. 8, 1994]

IN THE
SUPREME COURT OF ARKANSAS

No. 93-1240

(Title Omitted in Printing)

MOTION OF APPELLANTS U.S. TERM LIMITS, INC.,
ET AL. FOR LEAVE TO FILE EXHIBITS
TO REPLY BRIEF

U.S. Term Limits, Inc., Frank Gilbert, Greg Rice, Lon Schultz, and Spencer Plumley ("USTL"), appellants herein, respectfully move that the Court accept for filing the exhibits attached to the reply brief tendered by USTL on February 7, 1994. The grounds for this motion are more fully stated in the accompanying Memorandum of Authorities.

Respectfully submitted,

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February 8, 1994

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS
JUSTICE BUILDING
625 Marshall Street
Little Rock, AR 72201

February 14, 1994

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RE: 93 01240 U. S. TERM LIMITS INC. ET AL v.
BOBBIE E. HILL ET AL

Gentlemen:

The Arkansas Supreme Court made the following orders today in the above styled case:

"Motion of appellants U.S. Term Limits, Inc. et al. to supplement the record is granted. Motion of appellants and cross-appellees U.S. Term Limits, Inc., et al. to dismiss cross-appeal is denied. Motion of appellants U.S. Term Limits, Inc., et al. to file exhibits in reply brief is granted. Holt, C.J., and Newbern, Glaze, and Corbin, JJ., not participating."

Sincerely,

/s/ Leslie W. Steen
LESLIE W. STEEN
Clerk

* * * *

ARKANSAS SUPREME COURT
PROCEEDINGS OF MARCH 14, 1994

PER CURIAM ORDERS

REHEARING DENIED: Petitions for rehearing are denied today in the following cases.

* * * *

93-1240. U. S. Term Limits, Inc., et al. v. Bobbie E. Hill, et al., from Pulaski Circuit. Petition of State of Arkansas *ex rel* Attorney General Winston Bryant. Special Chief Justice George K. Cracraft and Special Justices Ernie Wright and Gerald Brown join. Special Justice Carl McSpadden would grant. Holt, C.J., and Newbern, Glaze, and Corbin, JJ., not participating.

93-1240, U. S. Term Limits, Inc., et al. v. Bobbie E. Hill, et al., from Pulaski Circuit. Petition of U. S. Term Limits, Inc., et al. Special Chief Justice George K. Cracraft and Special Justices Ernie Wright, Gerald Brown, and Carl McSpadden join. Hays, J., would grant. Holt, C.J., and Newbern, Glaze, and Corbin, JJ., not participating.

93-1240. U.S. Term Limits, Inc., et al. v. Bobbie E. Hill, et al., from Pulaski Circuit. Petition of Senatorial Unified Members. Special Chief Justice George K. Cracraft and Special Justices Ernie Wright and Gerald Brown join. Special Justice Carl McSpadden would grant. Holt, C.J., and Newbern, Glaze, and Corbin, JJ., not participating.

* * * *

AUG 16 1994

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

U.S. TERM LIMITS, INC., ARKANSANS FOR
GOVERNMENTAL REFORM, INC., FRANK GILBERT,
GREG RICE, LON SCHULTZ, and SPENCER PLUMLEY,
v. *Petitioners,*

RAY THORNTON, *et al.*,
Respondents.

WINSTON BRYANT,
ATTORNEY GENERAL OF ARKANSAS,
v. *Petitioner,*

BOBBIE E. HILL, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of Arkansas

BRIEF FOR PETITIONERS
U.S. TERM LIMITS, INC., *et al.*

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157 P2

QUESTION PRESENTED

Does Article I of the Constitution forbid a state to decline to print on its election ballots the names of multi-term incumbents in the House of Representatives and Senate?

LIST OF PARTIES

Petitioners in this Court are U.S. Term Limits, Inc., Arkansans for Governmental Reform, Inc., Frank Gilbert, Greg Rice, Lon Schultz, and Spencer Plumley.

Respondents in this Court and parties to the proceeding in the Supreme Court of Arkansas are:

Representatives and Senators: Ray Thornton, Blanche Lambert, Dale Bumpers, David Pryor, Jay Dickey, and Tim Hutchinson.

State legislators: James C. "Jim" Scott, W.D. "Bill" Moore, Jr., Mike Ross, Wayne Dowd, Neely Cassady, George Hopkins, Jean C. Edwards, Jay Bradford, Travis A. Miles, Lu Hardin, Eugene "Bud" Canada, Charlie Cole Chaffin, Vic Snyder, Jerry D. Jewell, Cliff Hoofman, Stanley Russ, Mike Beebe, Roy C. "Bill" Lewellen, Mike Everett, Steve Bell, Allen Gordon, Jon S. Fitch, Morrill Harriman, Mike Bearden, Jerry P. Bookout, Mike Todd, Nick Wilson, Steve Luelf, Joe E. Yates, David R. Malone, Clarence Bell, Jack Anderson Gibson, Bill Gwatney, Reid Holiman, Railey A. Steele, Louis McJunkin, Jerry Hutton, B.G. Hendrix, Carolyn Pollan, Ralph "Buddy" Blair, Jr., W.R. "Bud" Rice, Ode Maddox, Gus Wingfield, Hoya D. Horn, David Beatty, Arthur Carter, Charles Whorton, Jr., Frank J. Willems, Lloyd R. George, Bob J. Watts, L.L. "Doc" Bryan, Bruce Hawkins, James C. Allen, John W. Parkerson, John H. Dawson, Billy Joe Purdom, Randy Thurman, W.H. "Bill" Sanson, Bill Stephens, H. Lacy Landers, Bobby G. Newman, Jodie Mahony, Phil Wyrick, Mark Pryor, Carol "Coach" Henry, James G. Dietz, Doug Wood, Mike Wilson, William H. Townsend, Larry Goodwin, John E. Miller, John Paul Capps, J. Sturgis Miller, Josetta E. Wilkins, Jacqueline J. Roberts, Charlotte Schexnayder, Jimmie Don McKissack, Michael K. Davis, Thomas G. Baker, Albert "Tom" Collier, V.O. "Butch" Calhoun, Wanda Northcutt, N.B. "Nap" Murphy, Jime Holland, Tim Wooldridge, Bobby G. Wood,

Bobby L. Hogue, Owen Miller, J.L. "Jim" Shaver, Pat Flanagan, Wayne Wagner, Christene Brownlee, Lloyd C. McCuiston, Jr., Bob McGinnis, Ernest Cunningham, Bynum Gibson, Jim Von Gremp, Dennis Young, Armil O. Curran, D.R. "Buddy" Wallis, Vada Sheid, Greg Wren, E. Ray Stalnaker, David Choate, Bill Fletcher, Marian D. Owens, and Claud V. Cash.

Others: State of Arkansas, Republican Party of Arkansas, Democratic Party of Arkansas, Bobbie E. Hill, Dick Herget, Americans for Term Limits, Steve Goss, W. Asa Hutchinson, George O. Jernigan, Jr., Mark Riable, and Bill Walters.

LIST PURSUANT TO RULE 29.1

Petitioner U.S. Term Limits, Inc., is a non-profit corporation incorporated under the laws of the District of Columbia. It has no parent companies or subsidiaries. Arkansans for Governmental Reform, Inc., is a not-for-profit corporation incorporated under the laws of Arkansas. It has no parent companies or subsidiaries. Americans for Term Limits is a not-for-profit corporation incorporated under the laws of Arkansas. On information and belief, it has no parent companies or subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
LIST PURSUANT TO RULE 29.1	iii
TABLE OF AUTHORITIES	ix
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED.....	2
STATEMENT	2
SUMMARY OF ARGUMENT	4
ARGUMENT	8
I. ARTICLE I ASSIGNS THE STATES BROAD POWER TO REGULATE CONGRESSIONAL ELECTIONS	8
A. Article I, § 2, Authorizes "Wide Discretion" in Choosing Representatives	8
B. Article I, § 3, Provided for Choosing Sena- tors as the State Legislatures Saw Fit.....	9
C. Article I, § 4, Grants "Broad" Power To Reg- ulate the Manner of Elections	9
D. Article I Includes Minimum Qualifications....	11
E. The Tenth Amendment Confirms State Authority	13
II. THE RECORD DOES NOT SUPPORT THE HOLDING THAT AMENDMENT 73 CRE- ATES A DISQUALIFICATION LIKE THOSE IN ARTICLE I	14

TABLE OF CONTENTS—Continued

	Page
A. This Court Does Not Treat Ballot Restriction As Disqualification From Office	15
B. The Record Does Not Support the Assumption That Established Incumbents Cannot Win Reelection by Write-In	17
C. The Benefit of Continued Ballot Access Is Less Crucial for Long-Time Incumbents.....	19
1. Congressional Incumbents Receive Many Other Benefits	19
2. State Election Laws Often Unequally Favor Incumbents	21
III. STATE LIMITS ON TERMS IN CONGRESS WOULD NOT VIOLATE ARTICLE I	25
A. Contemporaneous Practice Emphatically Confirmed State Power	25
1. The States Have Enacted Additional Qualifications Since 1788	25
(a) The Early Laws	25
(b) The Current Laws	27
2. Congress Has Enacted Additional Disqualifications Since 1789	30
B. No Prohibition on Added State Qualifications Is Implied in the Constitution	32
1. Withdrawals of State Power Are Rarely Implied	32
2. Amendment 73 Does Not Affect Article I's Disqualifications	35
3. Citizenship and Residency Were Determined by State Laws	36
4. Other "Qualification" Clauses Do Not Impliedly Bar State Laws	37
C. State Power Was Not Questioned When the Constitution Was Adopted	38

TABLE OF CONTENTS—Continued

	Page
1. The Constitutional Convention	38
2. The Ratifying Conventions and <i>The Federalist</i>	42
D. This Court's Prior Decisions Recognize Legislative Power To Add Disqualifications.....	44
E. Other Sources Are Inconclusive	46
1. House and Senate Seating Votes	46
2. Old Cases	46
3. Commentators	47
CONCLUSION	50
APPENDICES	
A. Amendment 73	1a
B. Constitutional Provisions	3a
C. Early State Laws—Congress	8a
D. Early State Laws—Presidential Electors	19a
E. Federal Disqualification Laws	25a
1. Current Disqualification Laws	25a
2. Former Disqualification Laws	30a
F. Other Arkansas Election Provisions	43a
G. Examples of Other States' Election Laws	54a
1. Eligibility To Vote	54a
2. District Residency	54a
3. Durational Residency	55a
4. Disqualifications for Felonies	57a
5. Disqualifications for Particular Offenses....	61a
6. Disqualifications for Mental Incompetency..	65a
7. Prohibitions of Dual Candidacy	67a
8. Disqualifications of State Officials and Employees	69a

TABLE OF CONTENTS—Continued

	Page
9. Typical Primary Laws	74a
10. Non-Affiliation Requirements	75a
11. Affiliation Requirements	77a
12. Filing Fees	79a
13. "Spoiler" Laws	81a
14. Loyalty and State Oaths	86a

TABLE OF AUTHORITIES

Cases:	Page
<i>Adams v. Supreme Court</i> , 502 F. Supp. 1282 (M.D. Pa. 1980)	47
<i>American Party v. Whelan</i> , 415 U.S. 767 (1974)	23, 28
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	19, 22
<i>Atascadero State Hospital v. Scanlon</i> , 473 U.S. 234 (1985)	33
<i>Barclays Bank PLC v. Franchise Tax Bd.</i> , 114 S. Ct. 2268 (1994)	34, 35
<i>Barron v. Baltimore</i> , 7 Pet. 243 (1833)	5, 33
<i>Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.</i> , 276 U.S. 518 (1928)	49
<i>Bond v. Floyd</i> , 385 U.S. 116 (1966)	12
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973)	29
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	7, 21, 37, 45
<i>Bullock v. Carter</i> , 405 U.S. 134 (1972)	22
<i>Burdick v. Takushi</i> , 112 S. Ct. 2059 (1992)	5, 15, 21, 22
<i>Burns v. Richardson</i> , 384 U.S. 73 (1966)	24
<i>Burton v. United States</i> , 202 U.S. 344 (1906)	32
<i>California v. Thompson</i> , 313 U.S. 109 (1941)	34
<i>Carroll v. United States</i> , 267 U.S. 132 (1925)	30
<i>Clements v. Fashing</i> , 457 U.S. 957 (1982)	29, 47, 50
<i>Cooley v. Board of Wardens</i> , 12 How. 299 (1852) ..	34
<i>Danielson v. Fitzsimmons</i> , 232 Minn. 149, 44 N.W.2d 484 (1950)	29, 47
<i>Davis v. Bandemer</i> , 478 U.S. 109 (1986)	24
<i>De Veau v. Braisted</i> , 363 U.S. 144 (1960)	6, 31
<i>Doulin v. White</i> , 535 F. Supp. 450 (E.D. Ark. 1982)	24
<i>Duggan v. Beermann</i> , 245 Neb. 907, 515 N.W.2d 788 (1994)	21
<i>Erie R.R. v. Tompkins</i> , 304 U.S. 64 (1938)	49
<i>Eron v. Tiemann</i> , 279 F. Supp. 609 (D. Neb. 1968)	29
<i>Fletcher v. Peck</i> , 6 Cranch 87 (1810)	13
<i>Freytag v. Commissioner</i> , 111 S. Ct. 2631 (1991) ..	37
<i>Gaffney v. Cummings</i> , 412 U.S. 735 (1973)	24
<i>Garcia v. San Antonio Metro. Transit Auth.</i> , 469 U.S. 528 (1985)	7, 14

TABLE OF AUTHORITIES—Continued

	Page
<i>Gardner v. Ray</i> , 154 Ky. 509, 157 S.W. 1147 (1913).....	28
<i>Golden v. Prince</i> , 10 Fed. Cas. 542 (C.C.D. Pa. 1814) (No. 5,509)	33
<i>Goldstein v. California</i> , 412 U.S. 546 (1973)	6, 32, 34
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991)	13
<i>Grove v. Emison</i> , 113 S. Ct. 1075 (1993)	24
<i>H.P. Hood & Sons, Inc. v. DuMond</i> , 226 U.S. 525 (1949)	34
<i>Honda Motor Co. v. Oberg</i> , 114 S. Ct. 2331 (1994) ..	27
<i>Hooven & Allison Co. v. Evatt</i> , 324 U.S. 652 (1945)	18
<i>Hopfmann v. Connolly</i> , 746 F.2d 97 (1st Cir. 1984), <i>vacated in part</i> , 471 U.S. 459 (1985)	3, 16
<i>Houston v. Moore</i> , 5 Wheat. 1 (1820)	33
<i>INS v. Chadha</i> , 462 U.S. 919 (1983)	44, 50
<i>Jackman v. Rosenbaum Co.</i> , 260 U.S. 22 (1922)	27
<i>Jenness v. Fortson</i> , 403 U.S. 431 (1971) ..18, 19, 21, 23, 28	
<i>Joyner v. Mofford</i> , 706 F.2d 1523 (9th Cir.), <i>cert. denied</i> , 464 U.S. 1002 (1983)	3, 16, 47
<i>J.W. Hampton, Jr. & Co. v. United States</i> , 276 U.S. 394 (1928)	27
<i>Karcher v. Daggett</i> , 462 U.S. 725 (1983)	4, 23
<i>Kewanee Oil Co. v. Bicron Corp.</i> , 416 U.S. 470 (1974)	34
<i>Legislature v. Eu</i> , 54 Cal. 3d 492, 816 P.2d 1309 (1991), <i>cert. denied</i> , 112 S. Ct. 1292 (1992)	23
<i>Lubin v. Panish</i> , 415 U.S. 709 (1974)	19
<i>Lynch v. Donnelly</i> , 465 U.S. 668 (1984)	30
<i>Mandel v. Bradley</i> , 432 U.S. 173 (1977)	19
<i>Marsh v. Chambers</i> , 463 U.S. 783 (1983)	30
<i>Mayor of New York v. Miln</i> , 11 Pet. 102 (1837)	49
<i>McCulloch v. Maryland</i> , 4 Wheat. 316 (1819)	33
<i>McPherson v. Blacker</i> , 146 U.S. 1 (1892)	8, 27, 38
<i>Minor v. Happersett</i> , 21 Wall. 162 (1875)	27
<i>Miyazawa v. City of Cincinnati</i> , 825 F. Supp. 816 (S.D. Ohio 1993)	23
<i>Moore v. McCartney</i> , 425 U.S. 946 (1976)	22
<i>Munro v. Socialist Workers Party</i> , 479 U.S. 189 (1986)	5, 23, 28

TABLE OF AUTHORITIES—Continued

	Page
<i>Myers v. United States</i> , 272 U.S. 52 (1926)	30
<i>Newberry v. United States</i> , 256 U.S. 232 (1921)	11, 46
<i>New State Ice Co. v. Liebmann</i> , 285 U.S. 262 (1932)	50
<i>New York v. United States</i> , 112 S. Ct. 2408 (1992)	13, 14
<i>New York Trust Co. v. Eisner</i> , 256 U.S. 345 (1921)	27
<i>Nixon v. United States</i> , 113 S. Ct. 732 (1993)	7, 44
<i>Norman v. Reed</i> , 112 S. Ct. 698 (1992)	5, 19
<i>Ohio ex rel. Davis v. Hildebrant</i> , 241 U.S. 565 (1916)	9
<i>Oklahoma State Election Bd. v. Coats</i> , 610 P.2d 776 (Okla. 1980)	47
<i>Oregon v. Mitchell</i> , 400 U.S. 1125 (1970)	10, 37
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969)	7, 35, 39, 41, 44, 45, 46, 47, 48, 50
<i>Public Citizen, Inc. v. Miller</i> , 992 F.2d 1548 (11th Cir. 1993)	17
<i>Public Citizen, Inc. v. Miller</i> , 813 F. Supp. 821 (N.D. Ga.), <i>aff'd</i> , 992 F.2d 1548 (11th Cir. 1993)	17
<i>Quinn v. Millsap</i> , 491 U.S. 95 (1989)	26
<i>Richardson v. Ramirez</i> , 418 U.S. 24 (1974)	27
<i>Rosario v. Rockefeller</i> , 410 U.S. 752 (1973)	21
<i>Roth v. Cuevas</i> , 82 N.Y.2d 791, 624 N.E.2d 689 (1993)	23
<i>Roth v. Cuevas</i> , 158 Misc. 2d 238, 603 N.Y.S.2d 962, <i>aff'd</i> , 82 N.Y.2d 791, 624 N.E.2d 689 (1993)	23
<i>Roudebush v. Hartke</i> , 405 U.S. 15 (1972)	10
<i>Secretary of State v. McGucken</i> , 244 Md. 70, 222 A.2d 693 (1966)	28
<i>Skeen v. Hooper</i> , 631 F.2d 707, 711 (10th Cir. 1980)	18
<i>Smiley v. Holm</i> , 285 U.S. 355 (1932)	9, 10, 32
<i>Smith v. Ehrlich</i> , 430 F. Supp. 818 (D.D.C. 1976) ..	29
<i>Stack v. Adams</i> , 315 F. Supp. 1295 (N.D. Fla. 1970)	47

TABLE OF AUTHORITIES—Continued

	Page
<i>State ex rel. Johnson v. Crane</i> , 65 Wyo. 189, 197 P.2d 864 (1948)	16
<i>State ex rel. Maloney v. McCartney</i> , 159 W. Va. 513, 223 S.E.2d 607, appeal dismissed sub nom. <i>Moore v. McCartney</i> , 425 U.S. 946 (1976)	23
<i>State ex rel. McCarthy v. Moore</i> , 87 Minn. 308, 92 N.W. 4 (1902)	17
<i>State ex rel. O'Sullivan v. Swanson</i> , 127 Neb. 806, 257 N.W. 255 (1934)	17
<i>State ex rel. Wettengel v. Zimmerman</i> , 249 Wis. 237, 24 N.W.2d 504 (1946)	47
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	4, 5, 11, 15, 16, 19, 21, 28
<i>Stuart v. Laird</i> , 1 Cranch 299 (1803)	27
<i>Sturges v. Crowninshield</i> , 4 Wheat. 122 (1819)	5, 33
<i>Swift v. Tyson</i> , 16 Pet. 1 (1842)	49
<i>Tafflin v. Levitt</i> , 493 U.S. 455 (1990)	13, 33
<i>Tashjian v. Republican Party</i> , 479 U.S. 208 (1986)	10, 11, 12, 36, 37
<i>Thorsted v. Gregoire</i> , 841 F. Supp. 1068 (W.D. Wash. 1994), appeal pending sub nom. <i>Thorsted v. Munro</i> , Nos. 94-35222 etc. (9th Cir.), cert. denied sub nom. <i>Citizens for Term Limits v. Foley</i> , 114 S. Ct. 2727 (1994)	17, 21, 22
<i>Truax v. Corrigan</i> , 257 U.S. 312 (1921)	50
<i>Turner v. Arkansas</i> , 784 F. Supp. 585 (E.D. Ark. 1991)	25
<i>Tyler Pipe Industries, Inc. v. Washington State Dep't</i> , 483 U.S. 232 (1987)	34
<i>U.S. Civil Service Comm'n v. National Ass'n of Letter Carriers</i> , 413 U.S. 548 (1973)	29
<i>United Pub. Workers v. Mitchell</i> , 330 U.S. 75 (1947)	29
<i>United States v. Classic</i> , 313 U.S. 299 (1941)	8, 10, 11, 15, 32
<i>United States v. Darby</i> , 312 U.S. 100 (1941)	13
<i>Voinovich v. Quilter</i> , 113 S. Ct. 1149 (1993)	24
<i>Wesberry v. Sanders</i> , 376 U.S. 1 (1964)	8
<i>White v. Weiser</i> , 412 U.S. 783 (1973)	24, 25
<i>Wilbur v. Mahan</i> , 3 F.3d 214 (7th Cir. 1993)	29
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968)	38

TABLE OF AUTHORITIES—Continued

	Page
<i>Williams v. Tucker</i> , 382 F. Supp. 381 (M.D. Pa. 1974)	47
<i>Wisconsin v. Pelican Ins. Co.</i> , 127 U.S. 265 (1888) ..	25
<i>Zschoernig v. Miller</i> , 389 U.S. 429 (1968)	34
<i>Constitutional Provisions:</i>	
U.S. Constitution, Article I	i, passim
Article I, § 2	3, 4, 5, 6, 8, 9, 11, 12, 36, 37, 38, 39, 44, 46
Article I, § 3	3, 5, 9, 11, 12, 36, 37, 44, 47
Article I, § 4	5, 9, 10, 11, 24, 27, 34, 37, 42, 45, 46, 49
Article I, § 5	7, 35, 44, 45, 46, 47
Article I, § 6	12
Article I, § 8	33, 34
Article I, § 9	37
Article I, § 10	6, 33
Article II, § 1	38
Article VI	12, 33, 49
First Amendment	3, 16, 22
Tenth Amendment	6, 13, 14
Eleventh Amendment	33
Fourteenth Amendment	3, 5, 10, 12, 16, 17, 19, 22, 24, 36, 38
Fifteenth Amendment	24
Seventeenth Amendment	9, 37, 46
Nineteenth Amendment	27
Twenty-second Amendment	23
Ala. Const., Art. VIII, § 182	27, 62a
Alaska Const., Art. V, § 2	57a
Ariz. Const., Art. VII, § 18	21
Ariz. Const., Art. XXII, § 18	69a
Ark. Const., Art. 3, § 1	43a
Ark. Const., Art. 19, § 3	43a
Ark. Const., Amend. 7	46
Ark. Const., Amend. 29	15, 23, 28, 44a
Ark. Const., Amend. 51, § 17	44a
Ark. Const., Amend. 73	2, passim

TABLE OF AUTHORITIES—Continued

Page

Colo. Const., Art. XVIII, § 9a	21
Fla. Const., Art. 6, § 4	21
La. Const., Art. X, § 9	71a
Md. Const., Art. XXVII (1776)	10
Mich. Const., Art. 2, § 10	21
Miss. Const., Art. 12, § 250	27, 54a, 64a
Mo. Const., Art. III, § 45a	21
Mo. Const., Art. 8, § 2	27
Mont. Const., Art. IV, § 8	21
Neb. Const., Art. XV, § 19	21
Nev. Const., Art. 15, § 3	27, 54a
N.H. Const., Pt. II (1784)	10
N.D. Const., Art. 2, § 2	27, 67a
Ohio Const., Art. V, § 8	21
Ore. Const., Art. II, § 20	21
Pa. Const., § 10 (1776)	13
Pa. Const., § 11 (1776)	10, 26
S.C. Const., Art. XII (1778)	13
S.C. Const., Art. XIII (1778)	13
S.D. Const., Art. III, § 32	21
Tex. Const., Art. XVI, § 65	73a
Vt. Const., Art. XXVII (1786)	10

Federal Statutes:

2 U.S.C. § 43	20
2 U.S.C. § 43b	20
2 U.S.C. § 46b-1	20
2 U.S.C. § 57	20
2 U.S.C. § 58	20
2 U.S.C. § 58a	20
2 U.S.C. § 58c	20
2 U.S.C. § 59	20
2 U.S.C. § 61-1	20
2 U.S.C. § 72a	20
2 U.S.C. § 123b	20
2 U.S.C. § 123b-1	20
2 U.S.C. § 288c	20
2 U.S.C. § 332	20
5 U.S.C. § 7311	31, 28a
5 U.S.C. § 7313	31, 28a

TABLE OF AUTHORITIES—Continued

Page

5 U.S.C. § 7322	29
5 U.S.C. § 7323	29
18 U.S.C. § 201	31, 25a
18 U.S.C. § 592	30, 31, 25a
18 U.S.C. § 593	30, 31, 26a
18 U.S.C. § 1901	31, 26a
18 U.S.C. § 2071	31, 27a
18 U.S.C. § 2381	31, 27a
18 U.S.C. § 2383	31, 27a
28 U.S.C. § 1257	1
39 U.S.C. § 3210	20
39 U.S.C. § 3211	20
39 U.S.C. § 3212	20
46 U.S.C. § 59	31, 29a
46 U.S.C. § 322	31, 29a
Voting Rights Act, 79 Stat. 445 (1965), as amended, 42 U.S.C. §§ 1971, 1973-1973bb-1	10, 24
5 U.S.C. § 2282 (1958 ed.)	31
8 U.S.C. § 1481 (1958 ed.)	31
18 U.S.C. § 202 (1958 ed.)	31
18 U.S.C. § 205 (1958 ed.)	31
18 U.S.C. § 206 (1958 ed.)	31
18 U.S.C. § 207 (1958 ed.)	31
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18 U.S.C. § 281 (1958 ed.)	31
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18 U.S.C. § 592 (1958 ed.)	31
18 U.S.C. § 1901 (1958 ed.)	31
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18 U.S.C. § 2381 (1958 ed.)	31
18 U.S.C. § 2387 (1958 ed.)	31
18 U.S.C. § 203 (1988 ed.)	31, 41a
18 U.S.C. § 204 (1988 ed.)	31, 42a
Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 67	30, 30a
Act of April 30, 1790, ch. 9, § 21, 1 Stat. 117	30, 31a
Act of May 8, 1792, ch. 37, § 12, 1 Stat. 281	30, 31a
Act of Dec. 31, 1792, ch. 1, § 26, 1 Stat. 298	30, 32a
Act of Feb. 18, 1793, ch. 8, § 29, 1 Stat. 315	30, 32a
Act of Feb. 26, 1853, ch. 81, §§ 5, 6, 10 Stat. 170	30, 33a,

TABLE OF AUTHORITIES—Continued

Page

Act of July 2, 1862, ch. 128, 12 Stat. 502	30, 35a
Act of July 16, 1862, ch. 180, 12 Stat. 577	30, 36a
Act of July 17, 1862, ch. 195, §§ 1-3, 12 Stat. 589.....	30, 37a
Act of June 11, 1864, ch. 119, 13 Stat. 123	30, 38a
Act of Feb. 25, 1865, ch. 52, §§ 1, 2, 13 Stat. 437.....	30, 39a
Act of March 3, 1911, ch. 231, § 144, 36 Stat. 1136	31, 40a
Act of Oct. 15, 1974, § 407, 88 Stat. 1263, 1290	31
Act of May 11, 1976, §§ 111, 114, 90 Stat. 475, 486, 495	31

State Statutes:

Ala. Code § 17-16-12	27, 61a, 77a
Ala. Code § 36-26-38	69a
Alaska Stat. § 15.25.030	57a, 67a, 77a
Alaska Stat. § 15.25.050	79a
Alaska Stat. § 39.25.160	69a
Ariz. Rev. Stat. Ann. § 13-904	27, 58a
Ariz. Rev. Stat. Ann. § 16-101	27, 56a, 65a
Ariz. Rev. Stat. Ann. § 16-311	27, 56a, 65a
Ariz. Rev. Stat. Ann. § 41-772	70a
Ark. Code Ann. § 7-3-108	23, 45a
Ark. Code Ann. § 7-5-205	23
Ark. Code Ann. § 7-5-207	46a
Ark. Code Ann. § 7-7-101	47a
Ark. Code Ann. § 7-7-102	47a
Ark. Code Ann. § 7-7-103	23, 28, 48a
Ark. Code Ann. § 7-7-203	49a
Ark. Code Ann. § 7-7-301	23, 28, 50a
Ark. Code Ann. § 7-8-101	23, 52a
Ark. Code Ann. § 14-49-202	52a
Ark. Code Ann. § 14-49-306	52a
Ark. Code Ann. § 14-50-202	52a
Ark. Code Ann. § 14-50-306	53a
Ark. Code Ann. § 16-90-112	27, 53a
Cal. Elec. Code § 6401	75a
Cal. Elec. Code § 6402	68a
Cal. Elec. Code § 6552	79a
Cal. Elec. Code § 6831	28
Cal. Elec. Code § 6838	28
Cal. Elec. Code § 25003	21

TABLE OF AUTHORITIES—Continued

Page

Colo. Rev. Stat. § 1-4-101	78a
Colo. Rev. Stat. § 1-4-105	28, 81a
Colo. Rev. Stat. § 1-4-802	28, 56a
Conn. Gen. Stat. § 9-46	58a
Conn. Gen. Stat. § 9-379	74a
Conn. Res. of Oct. 9, 1788	26, 8a
Conn. Act of Jan. 1, 1789	26, 10a
Del. Act of Oct. 28, 1788	26, 38, 11a, 20a
Fla. Stat., ch. 99.021	78a
Ga. Act of Jan. 23, 1789	26, 17a
Ga. Code Ann. § 21-2-133	29, 81a
Ga. Code Ann. § 21-2-136	68a
Haw. Rev. Stat. § 2-12-7	86a
Haw. Rev. Stat. § 38-831-2	58a
Idaho Code § 34-604	28, 56a
Idaho Code § 34-605	28, 57a
Idaho Code § 34-704	31a
Idaho Code § 34-1904	28, 54a
Idaho Code § 67-5311	70a
Ill. Ann. Stat., ch. 10, § 5/7-10.1	86a
Ill. Ann. Stat., ch. 10, § 5/10-2	28, 81a
Ill. Ann. Stat., ch. 10, § 5/10-3	81a
Ill. Ann. Stat., ch. 10, § 5/17-16.1	82a
Ind. Code § 3-8-1-5.5	82a
Ind. Code § 3-8-2-8	28, 75a
Ind. Code § 3-8-7-25	74a
Ind. Code § 4-15-2-40	70a
Kan. Stat. Ann. § 19-4330	70a
Kan. Stat. Ann. § 25-202	28, 75a, 83a
Kan. Stat. Ann. § 25-803	76a
Kan. Stat. Ann. § 75-2953	71a
Ky. Rev. Stat. Ann. § 18A.140	71a
Ky. Rev. Stat. Ann. § 118.315	76a
Ky. Rev. Stat. Ann. § 118.345	83a
Ky. Rev. Stat. Ann. § 121A.990	62a
La. Rev. Stat. Ann. § 42:39	71a
Maine Rev. Stat. Ann., tit. 21-A, § 331(3)	28, 68a
Mass. Res. of Nov. 19, 1788	26, 38, 12a, 22a
Md. Act of Dec. 22, 1788	26, 38, 16a, 24a
Md. Code Ann., Art. 33, § 4-A-1	78a

TABLE OF AUTHORITIES—Continued

	Page
Md. Code Ann. Art. 33, § 8-2	28, 83a
Mich. Comp. L. § 38.412a	64a
Mich. Comp. L. § 168.91	63a
Mich. Comp. L. § 168.131	63a
Minn. Stat. § 204B.11	79a
Miss. Code Ann. § 23-15-19	64a
Mo. Rev. Stat. § 115.133	58a
Mo. Rev. Stat. § 115.349	58a
Neb. Rev. Stat. § 32-516	28, 29, 83a
Nev. Rev. Stat. § 293.193	80a
Nev. Rev. Stat. § 293.1755	28, 54a
N.H. Act of Nov. 12, 1788	38, 21a
N.H. Rev. Stat. Ann. § 607-A:2	27, 59a
N.H. Rev. Stat. Ann. § 659:91-a	28, 29, 84a
N.J. Act of Nov. 21, 1788	26, 38, 14a, 23a
N.J. Stat. Ann. § 19:4-1	27, 59a, 67a
N.J. Stat. Ann. § 19:13-8	27, 59a, 66a
N.M. Stat. Ann. § 8-1-8-19	84a
N.Y. Elec. Law § 6-142	28
N.C. Act of Dec. 16, 1789	26, 17a
N.C. Gen. Stat. § 163-55	60a
N.C. Gen. Stat. § 163-106	55a, 60a, 77a
N.C. Gen. Stat. § 163-123	28, 29, 84a
N.C. Gen. Stat. § 163-125	72a
N.D. Cent. Code § 16.1-01-13.1	28
N.D. Cent. Code § 16.1-13-06	28
N.D. Cent. Code § 44-01-01	27, 67a
Ohio Rev. Code Ann. § 124.57	73a
Ohio Rev. Code Ann. § 2961.01	61a
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Ohio Rev. Code Ann. § 3513.191	77a
Okla. Stat., tit. 19, § 215.8	73a
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Pa. Act of Oct. 4, 1788	38, 19a
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R.I. Gen. Laws § 17-23-1	65a
R.I. Gen. Laws § 17-23-5	65a

TABLE OF AUTHORITIES—Continued

	Page
S.C. Code Ann. § 7-11-10	85a
S.C. Code Ann. § 7-11-210	28
S.D. Cod. L. § 12-6-3	69a
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Tenn. Act of Aug. 3, 1796	26, 18a
Tenn. Code § 2-5-101	28, 85a
Va. Act of Nov. 17, 1788	38, 21a
Va. Act of Nov. 20, 1788	26, 13a
Va. Act of Dec. 26, 1792	26, 13a
Wash. Rev. Code § 29.68	21
W. Va. Code § 3-1-3	61a
W. Va. Code § 3-5-7	61a, 69a
W. Va. Code § 29-6-20	74a
Wyo. Stat. § 22-5-101	75a
Wyo. Stat. § 22-5-104	21

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S. Res. 63, 103d Cong., 1st Sess. (1993)	20
Parliamentary Test Act, 30 Car. II, stat. 2 (1677)	13

Miscellaneous:

1 ANNALS OF CONG. (1790) (Gales & Seaton ed.)	37
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16 ANNALS OF CONG. (1806)	47
17 ANNALS OF CONG. (1807)	46
Articles of Confederation, Art. V	10, 40
Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941)	46, 49
M. CLARKE & D. HALL, CASES OF CONTESTED ELEC- TIONS IN CONGRESS (1834)	46
E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957 (4th rev. ed. 1957)	31
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TABLE OF AUTHORITIES—Continued

	Page
DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788-1790 (G. DenBoer, <i>et al.</i> , eds. 1976-89)	9
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M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (rev. ed. 1966) ..	10, 24, 35, 36, 37, 39, 40, 41, 43, 45, 46
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F. FRANKFURTER, THE COMMERCE CLAUSE (1937) ..	33
L. FREDMAN, THE AUSTRALIAN BALLOT (1968)	15
Frenzel, <i>Term Limits and the Immortal Congress</i> , BROOKINGS REV. 18 (Spring 1992)	20
J. KENT, COMMENTARIES ON AMERICAN LAW (1826)	49
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J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833)	14, 18, 49
ST. G. TUCKER, BLACKSTONE'S COMMENTARIES (1803)	47
Wechsler, <i>The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government</i> , 54 COLUM. L. REV. 543 (1954)	14
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G. WILL, RESTORATION (1992)	20

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

Nos. 93-1456 and 93-1828

U.S. TERM LIMITS, INC., *et al.*,
Petitioners,
 v.

RAY THORNTON, *et al.*,
Respondents.

WINSTON BRYANT,
 ATTORNEY GENERAL OF ARKANSAS,
 v. *Petitioner,*

BOBBIE E. HILL, *et al.*,
Respondents.

On Writ of Certiorari to the
 Supreme Court of Arkansas

BRIEF FOR PETITIONERS
 U.S. TERM LIMITS, INC., *et al.*

OPINIONS BELOW

The unreported opinions of the Circuit Court of Pulaski County, Arkansas are at P.C.A. 45a, and 53a. The opinions of the Supreme Court of Arkansas are reported at 316 Ark. 251 and 872 S.W.2d 349, and appear at P.C.A. 1a; its order denying rehearing is at P.C.A. 44a.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered March 7, 1994, and rehearing was denied March 14, 1994. P.C.A. 1a, 44a. The petition for certiorari in No. 93-1456 was filed March 17, 1994, and granted June 20, 1994. J.A. 208. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 73 of the Constitution of Arkansas and pertinent portions of the Constitution of the United States and statutory authorities are reproduced in the Appendices hereto, respectively pp. 1a and 3a, *infra*.

STATEMENT

On November 3, 1992, 60% of the voters of Arkansas adopted the Arkansas Constitution's Amendment 73, declaring:

"The people of Arkansas find and declare that elected officials who remain in office too long become pre-occupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers."

P. 1a, *infra*.¹ The amendment provides that after being elected three times (six years) to the U.S. House of Representatives, or twice (twelve years) to the U.S. Senate, an incumbent's name will not continue to appear on the printed ballot for reelection to those respective offices. *Id.*, § 3, p. 2a, *infra*. However, such a person may nevertheless continue to run for election to that office, and may serve if elected. *Id.*, P.C.A. 15a.²

A voter brought this suit challenging Amendment 73 on several state and federal constitutional grounds. J.A. 41. Petitioners, who are its official sponsor and supporters, J.A. 72, 101-02, intervened as defendants. J.A. 90, 147. The Circuit Court of Pulaski County, Arkansas, without taking evidence granted summary judgment,

¹ The Amendment received 59.9% of the vote cast and carried all but six of Arkansas' 75 counties. J.A. 164-66.

² Amendment 73 separately establishes term limits of varying length for offices in the executive and legislative branches of the state government. *Id.*, §§ 1, 2. These provisions were upheld by the Supreme Court of Arkansas without dissent against First and Fourteenth Amendment challenge. P.C.A. 20a, 27a, 42a.

holding Amendment 73 "void and invalid" under Arkansas law for a defect in its enacting clause. P.C.A. 61a. The court added its opinion that none of Amendment 73's provisions would violate the First or Fourteenth Amendments, but that its ballot restrictions on multi-term incumbents seeking reelection to the House or Senate would violate Article I of the Constitution of the United States. P.C.A. 59a-60a.

On appeal, the Supreme Court of Arkansas issued five opinions, three for the majority and two dissents. It held that Amendment 73 had been adopted in compliance with state law, but then ruled by a vote of 5-2 that insofar as Amendment 73 restricts ballot access for multi-term congressional incumbents, it violates Article I. A plurality opinion of three justices acknowledged that under Amendment 73 such an incumbent "is not totally disqualified and might run as a write-in candidate" or serve after appointment to a vacancy. P.C.A. 15a. However, without elaboration it concluded that

"These glimmers of opportunity for those disqualified, though, are faint, indeed—so faint in our judgment that they cannot salvage Amendment 73 from constitutional attack."

P.C.A. 15a. On that basis it ruled that Amendment 73 had established a disqualification for being a Representative or Senator equivalent to those in Article I, §§ 2 and 3. It then held that, although the point was "not specifically addressed" in the Constitution, P.C.A. 12a, nevertheless "[q]ualifications set out in the U.S. Constitution" in Article I, §§ 2 and 3, "fix the sole requirements for congressional service." P.C.A. 14a-15a.

One dissent, citing two federal court of appeals decisions,³ reasoned that Amendment 73 "merely makes it more difficult for an incumbent to be elected," and "a person is qualified within the meaning of Article I of the United States Constitution if permitted to serve if elected."

³ *Hopfmann v. Connolly*, 746 F.2d 97 (1st Cir. 1981), vacated in part on other grounds, 471 U.S. 459 (1985); *Joyner v. Mofford*, 706 F.2d 1523 (9th Cir.), cert. denied, 484 U.S. 1001 (1983).

P.C.A. 37a. Another dissenter concluded that "the qualifications [in Article I, §§ 2 and 3] are to be the *minimum* requirements rather than the *exclusive* requirements." P.C.A. 34a (emphasis in original). Rehearing was denied. J.A. 207. This Court granted certiorari. J.A. 208, 209.

SUMMARY OF ARGUMENT

1. Amendment 73 does not set a qualification for office. Certainly it was advocated by supporters of turnover in elective offices, and is designed to lessen the overwhelming election advantages, many of them governmentally conferred, that are enjoyed by multi-term incumbents. But it does so only by not continuing to print such incumbents' names on ballots. It does not disqualify them from running, being elected, or serving in office.

This Court has never held that Article I bars a state ballot restriction. That claim once was urged against a California law that restricted access to the ballot based on prior political affiliation and activity. *Storer v. Brown*, 415 U.S. 724 (1974). The argument that the ballot law was a qualification and violated Article I was dismissed by this Court with incredulity, as "wholly without merit." 415 U.S. at 746 n.16. Practically all state election laws, and ballot regulations in particular, influence election outcomes—none more so than the ballot restrictions accompanying primary-election laws, which States have enacted for nearly a century now, and whose usual beneficiaries are incumbents. *E.g.*, *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). Until this year the courts have consistently held that Article I simply is not implicated by state laws that deny benefits or make election more difficult, but do not prohibit election and service. Pp. 15-17, *infra*.

The holding of the Arkansas court is that not printing a multi-term incumbent's name on the ballot amounts to a prohibition on holding office. But both history and the record in this case fail to support that assertion. Members of the House and Senate have been elected by write-in, including a Representative from Arkansas. And

the record here is that name recognition along with the many other advantages of congressional incumbency make a multi-term incumbent's opportunity for write-in victory substantial. Pp. 17-19, *infra*.

States are not free, of course, to pass any ballot restrictions they want. State ballot-access laws can properly be, and regularly are, subjected to constitutional testing—but under the familiar standards of the Fourteenth Amendment. *E.g.*, *Norman v. Reed*, 112 S. Ct. 698 (1992); *Burdick v. Takushi*, 112 S. Ct. 2059 (1992); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). To depart from *Storer v. Brown* and the many decisions like it, and now equate a state ballot regulation with a disqualification for office, would open to Article I challenge the state primary laws and hundreds of other provisions by which fifty states tightly regulate congressional elections. For the courts to try to decide which of these state election laws should now be recharacterized as qualifications would be particularly unnecessary when the institution affected—the Congress—is specifically assigned full authority in Article I, § 4, to override Arkansas Amendment 73, or any other state law on congressional elections that it deems unwise.

2. Even if the Arkansas Supreme Court were correct in its assertion that Amendment 73 added qualifications for holding congressional office, still Article I would not be violated. Article I, in both § 2 and § 4, explicitly assigns the States broad power over congressional elections. It restricts such state regulations only by establishing Congress' power to annul them, which later was supplemented by the Fourteenth Amendment. Its disqualification provisions, in Article I, §§ 2 and 3, set minimums, but contain no restrictions on state laws.

The Arkansas court believed that Article I by implication takes away state power without saying so. But from the time of Chief Justice Marshall, this Court has repeatedly declined to imply prohibitions of state power from the Constitution's silence. *Sturges v. Crowninshield*, 4 Wheat. 12, 193 (1819); *Barron v. Baltimore*, 7 Pet.

243, 249 (1833); *Goldstein v. California*, 412 U.S. 546, 552 (1973). The Tenth Amendment further confirms that constitutional limitations on state power are normally express, *e.g.*, Article I, § 10, and only rarely to be implied.

It is no accident that the Constitution's text is barren of the prohibition the Arkansas Supreme Court implied. A clause that would have made the disqualifications in Article I, § 2, exclusive was deleted from an early draft. Thereafter exclusivity was not proposed or considered, and although the authority of *Congress* to add disqualifications was doubted by some, *state* power was never addressed. Indeed, when a proposal to set property requirements or specify a congressional power to do so was defeated—with some delegates commenting that the subject was not appropriate for national uniformity—others added that specifying power to set property qualifications might be misunderstood to negate power to set other qualifications. See pp. 38-42, *infra*.

What the Constitution allowed the States to do was demonstrated by the added qualifications for Congress that over half of them promptly enacted. Immediately upon ratifying the Constitution, States passed laws requiring that Representatives be district residents; establishing nominating and screening processes for candidates; and even requiring that Representatives be landed property owners. (The States similarly added residence and property requirements for Presidential electors in addition to the disqualifications specified in Article II.) In fact, although some doubts had been expressed as to whether *Congress* (as opposed to the States) could add disqualifications, the First Congress without hesitation enacted the first of more than 200 years of federal statutes adding disqualifications for conviction of certain crimes, a practice it has followed "frequently and of old." *De Veau v. Braisted*, 363 U.S. 144, 159 (1960) (Frankfurter, J., announcing judgment). Many are still in force, as are similar state enactments which bar from election felons,

state officeholders, persons who are not voters, and a wide variety of other categories. See pp. 27-29, *infra*.

The Arkansas plurality cited *Powell v. McCormack*, 395 U.S. 486 (1969); but there this Court expressly declined to consider state power, and held only that when a single House sits as "Judge," then the term "Qualifications" as used in Article I, § 5, refers only to those set forth in the Constitution. See *Nixon v. United States*, 113 S. Ct. 732, 740 (1993); *Buckley v. Valeo*, 424 U.S. 1, 133 (1976). The Arkansas opinion postulated a need for "uniformity" in qualifications for Congress. P.C.A. 14a. But state congressional-election laws have never been uniform. And no State whose people limit how long their representatives will stay in a House of Congress casts any burden on other States, any more than if its people voted unwisely against a particular candidate. In fact, the States' central role in selecting their national representatives is an important protection in maintaining the balance of the federal system. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551 (1985).

It would be late in the day, given the volume of contemporaneous state, and even federal, disqualification legislation, and the ballot-restriction and disqualification laws in dozens of jurisdictions, now to hold that it all was and is unconstitutional, under an unstated implication from the Constitution's silence. Nor is it necessary in any sense to do so. No federal function is threatened. No majority is seeking to suppress ideas or to impose its will on a powerless minority or protected class. The voters of Arkansas were not altering the structure of the federal government. They were simply trying, in choosing their representation, to open the political process and to remove one of the many election advantages that long-term incumbents enjoy. The usual state power to regulate congressional elections should not be eliminated by an unstated negative implication when (1) the Constitution is silent; (2) two centuries of lawmaking are to the contrary; and (3) Congress, although specifically empowered by the Constitution to do so, has not seen fit to interfere.

ARGUMENT

I. ARTICLE I ASSIGNS THE STATES BROAD POWER TO REGULATE CONGRESSIONAL ELECTIONS.

Article I establishes a framework for conduct of congressional elections in which state authority is normally decisive.

A. Article I, § 2, Authorizes "Wide Discretion" in Choosing Representatives.

Article I, § 2, first directs that Representatives are to be chosen by the people of each State, with voters whose qualifications are the same as those of voters for the most numerous branch of the state legislature.

"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

By this clause, this Court has held,

"the states are given . . . a wide discretion in the formulation of a system for the choice by the people of representatives in Congress."

United States v. Classic, 313 U.S. 299, 311 (1941).

"[T]he states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4"

Id. at 315. Thus, for example, the States' power, even without congressional sanction, to elect a House member by people of a district instead of by the people of the State, as long as districts are reasonably equal in population, has "never been doubted." *McPherson v. Blacker*, 146 U.S. 1, 26 (1892); *cf. Wesberry v. Sanders*, 376 U.S. 1 (1964).

B. Article I, § 3, Provided for Choosing Senators as the State Legislatures Saw Fit.

The choosing of Senators was placed by Article I, § 3, in the discretion of the state legislatures:

"The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof"

The legislatures' methods varied, as did their criteria for election.⁴ In 1913 the Seventeenth Amendment reassigned this electoral power to parallel Article I, § 2.⁵

C. Article I, § 4, Grants "Broad" Power To Regulate the Manner of Elections.

The conduct of elections to both Houses of Congress was further specifically assigned to the States, subject to authority granted to Congress to override state laws or enact laws of its own on the subject. Section 4 of Article I provides:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature ^[6] thereof; but the Congress may at any time by Law make or alter such

⁴ At the first elections for Senators, in some legislatures both houses voted jointly (*e.g.*, Virginia and New Jersey). See 2 DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788-1790 281 (G. DenBoer, *et al.*, eds. 1984); 3 *id.* 25 (1986). Some voted separately (*e.g.*, Massachusetts and Connecticut). 1 *id.* 514-20 (1976); 2 *id.* 28. New Hampshire apparently had one house nominate, the other approve. 1 *id.* 783. New York could not agree on any procedure. 3 *id.* 513. Maryland formally required that one Senator reside on the Eastern Shore, the other on the Western Shore. 2 *id.* 146-49.

⁵ "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

⁶ The phrase "by the Legislature thereof" has long been construed to include initiatives, constitutional provisions, and other state methods of enacting laws. *Smiley v. Holm*, 285 U.S. 355, 372 (1932); *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565, 569-70 (1916).

Regulations, except as to the Places of chusing Senators."

As Madison explained "Times, Places and Manner," "These were words of great latitude." 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 240 (rev. ed. 1966) (hereinafter "FARRAND").⁷ This provision became controversial in the state ratifying conventions only because of the power it granted to Congress.⁸ It was defended as essential, because otherwise the States would be free to do whatever they chose. See THE FEDERALIST No. 59 at 399, 402-03 (Hamilton) (J. Cooke ed. 1961) (edition herein cited unless otherwise indicated).

Article I, § 4, thus confirms "a broad power." *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986); accord, *United States v. Classic*, *supra*. It has never been confined to minor matters of election procedure.⁹ "The breadth of those powers" allows the States, unless Congress acts, "to provide a complete code for congressional elections." *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972), quoting in part *Smiley v. Holm*, 285 U.S. 355,

⁷ The same word "manner" was used in the provision of the Articles of Confederation in accordance with which some States set term limits for their representatives (beyond those in the Articles themselves): "delegates shall be annually appointed in such manner as the legislature of each State shall direct." Art. of Confed. V; see Md. Const., Art. XXVII (1776); Pa. Const., § 11 (1776); N.H. Const., Pt. II (1784); Vt. Const., Art. XXVII (1786).

⁸ E.g., 4 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 50 (1836) (Governor Johnston of North Carolina noting that several states had proposed amendments to limit Congress' power over elections); 2 *id.* 49 (Massachusetts) 325-26 (New York); 3 *id.* 175 (Virginia); 4 *id.* 52 (North Carolina) (hereinafter "ELLIOT").

⁹ See *Oregon v. Mitchell*, 400 U.S. 112, 117-18 (1970) (Black, J., announcing judgment that Article I, § 4, empowers Congress to lower age qualification for voters for Congress to eighteen years). In the federal Voting Rights Act, 79 Stat. 445 (1965), as amended, 42 U.S.C. §§ 1971, 1973-1973bb-1, Congress also under the Fourteenth Amendment vastly altered the establishment of congressional districts, the qualifications of voters, and the likelihood of particular categories of candidates being elected.

366 (1932).¹⁰ The States' authority over congressional elections, unless Congress steps in, is "matched by state control over the election process for state offices." *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986). Under both § 2 and § 4 of Article I,

"the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates."

Storer v. Brown, 415 U.S. 724, 730 (1974).

D. Article I Includes Minimum Qualifications.

Article I disqualifies from membership in the House or Senate persons who do not meet specified minimums of age, residency, and citizenship, and includes other requirements as well. The second clause of Article I, § 2, provides:

"No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."

With respect to Senators, Article I, § 3, provides that

"No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."¹¹

¹⁰ A narrow interpretation of "Times, Places and Manner," to exclude primary laws affecting which names appeared on the general election ballot, was adopted in the opinion of Justice McReynolds in *Newberry v. United States*, 256 U.S. 232, 257 (1921), but was explicitly rejected by this Court in *United States v. Classic*, *supra*, 313 U.S. at 317.

¹¹ Although some litigants and commentators lately refer to these as "the Qualifications Clauses," no such terminology was used

Madison grouped with these the fourth requirement, in Article I, § 6, that disqualifies any person holding other federal office from sitting in Congress.¹² See THE FEDERALIST No. 52 at 355. In addition, Article VI requires that members of Congress "be bound by Oath or Affirmation, to support this Constitution,"¹³ and Article I, § 3, cl. 7, authorizes disqualification from federal office as a punishment in cases of impeachment.¹⁴

Thus the three disqualifications listed in §§ 2 and 3 of Article I were never exclusive in the Constitution itself. Other qualifications for federal offices were contemplated by Article VI, which forbids religious tests. The most likely source of such tests would be the States, some of which imposed them in 1789; without this prohibition at the Constitutional Convention, and this Court has used the term "Qualifications Clause" to refer instead to Article I, § 2, cl. 1, which sets the "Qualifications" of voters. See *Tashjian v. Republican Party*, 479 U.S. 208, 225 (1986).

¹² Article I, § 6, provides in part:

"[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

In addition, section 3 of the Fourteenth Amendment added a disqualification of officials who after taking an oath to support the Constitution engage in rebellion against the United States or give aid and comfort to its enemies.

¹³ Article VI, cl. 3, provides:

"The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

The oath requirement thus constitutes a constitutional qualification for holding state as well as federal office; but it has never been claimed to be an exclusive one. Cf. *Bond v. Floyd*, 385 U.S. 116, 130-31 (1966).

¹⁴ Article I, § 3, cl. 7, provides in part:

"Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States"

tion, the offices to which state religious tests might otherwise apply were Representative and Senator.¹⁵

E. The Tenth Amendment Confirms State Authority.

The Tenth Amendment provides that

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

As a limitation on the powers of Congress, the amendment "states but a truism that all is retained which has not been surrendered." *New York v. United States*, 112 S. Ct. 2408, 2418 (1992), quoting *United States v. Darby*, 312 U.S. 100, 124 (1941). But applied to state power, the Tenth Amendment means something more. It confirms the understanding that unless the Constitution specifies or inescapably implies otherwise, legislative power of the States and people is undisturbed. Congress requires constitutional authorization to legislate; the States do not, and may exercise all powers not vested exclusively in the federal government, or prohibited to the States by the Constitution itself or by valid federal law or treaty. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).¹⁶ State laws, moreover, receive a presumption of constitutionality. *Fletcher v. Peck*, 6 Cranch 87, 128 (1810).

The powers which "remain in the State governments are numerous and indefinite." *Gregory v. Ashcroft*, *supra*, 501 U.S. at 458, quoting THE FEDERALIST No. 45 at 292-93 (C. Rossiter ed. 1961) (Madison). And the States' role in elections is particularly vital, for the Framers "gave the States a role in the selection of both

¹⁵ See, e.g., S.C. Const., arts. XII, XIII (1778); Pa. Const., § 10 (1776); cf. Parliamentary Test Act, 30 Car. II, stat. 2 (1677) (requiring religious oath and disqualifying Roman Catholics from Parliament).

¹⁶ The Arkansas plurality apparently misunderstood this, P.C.A. 12a, stressing that no national term-limits requirement had been required by the Constitution, and also that

"the framers of the U.S. Constitution did not expressly endow the States with this same authority."

the Executive and the Legislative Branches of the Federal Government" in order to "protect the States from overreaching by Congress." *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 551 (1985); see also *New York v. United States*, *supra*, 112 S. Ct. at 2418. The ability of the people of the States to choose who is to make federal laws for them is a practical and essential regulator of the federal balance. See Wechsler, *The Political Safeguards of Federalism*, 54 COLUM. L. REV. 543 (1954).¹⁷

II. THE RECORD DOES NOT SUPPORT THE HOLDING THAT AMENDMENT 73 CREATES A DISQUALIFICATION LIKE THOSE IN ARTICLE I.

Lacking the benefit of having one's name among the few on the ballot is of course a significant drawback to a

¹⁷ Justice Joseph Story in his treatise argued that because the offices of Representative and Senator had been created by the Constitution, no powers with respect to them could be "reserved" by the Tenth Amendment to the States, for "no powers could be reserved to the states, except those, which existed in the states before the constitution was adopted." 2 J. STORY, COMMENTARIES ON THE CONSTITUTION § 625 (1833); see also *id.* § 626. But the Tenth Amendment assigned to the States or people all powers which were not granted to the federal government or denied to the States; the term "reserved" is not temporal, but refers to the federal structure, with States exercising whatever powers were not assigned to the federal government, whether or not such powers had been previously exercised. Moreover, the Amendment was adopted in 1791, after Article I and its electoral system had already been adopted, and indeed many States had already passed laws adding particular qualifications for Congress in 1788, before the Constitution took effect. See pp. 25-27, *infra*. Finally, regulating elections to the national legislative body was not a new power previously unknown to the States; they had chosen their representatives in the Congress of the Articles of Confederation by any means they wanted, and some indeed had set term limits. See n. 7, *supra*. The exercise of essentially the same power under the superseding Constitution was nothing so novel as to be outside the scope of the Tenth Amendment. Cf. THE FEDERALIST No. 39 at 256 (Madison): "the proposed Government cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." (Emphasis in original.)

politician seeking reelection. But nothing in the record established that not continuing to appear on the ballot is the same as disqualification, and in fact the record demonstrated otherwise. Not surprisingly, this Court, federal courts of appeals, and other state supreme courts have held in similar situations that state restrictions on appearing on the printed ballot for Congress do not rise to the level of disqualifications for office.

A. This Court Does Not Treat Ballot Restriction as Disqualification From Office.

Printed election ballots came into use in the United States beginning in the late 1800's,¹⁸ and primary-election laws soon followed. States concurrently enacted a wide variety of laws restricting appearance on the ballot to a few candidates—usually party nominees and persons who can meet petition requirements.¹⁹ The constitutionality of state primary laws has never been seriously doubted. Cf., e.g., *United States v. Classic*, *supra*, 313 U.S. at 318. Today States also have myriad other laws that tightly restrict access to the printed ballot. See examples at Appendices F and G, pp. 43-87, *infra*.

The claim that a state law denying ballot access violates Article I has been considered and rejected by this Court. In *Storer v. Brown*, 415 U.S. 724 (1974), a California law barred from the printed ballot any independent candidate for the House of Representatives who had been affiliated with a political party within the year prior to the preceding primary, or had voted in the primary. Two candidates for the House argued at length

¹⁸ Prior to that time, elections for Congress were conducted by voters' writing the name of the person favored on a slip of paper, preparing their own ballots, or *viva voce*. See *Burdick v. Takushi*, *supra*, 112 S. Ct. at 2070 (Kennedy, J., dissenting).

¹⁹ E.g., Ark. Const., amend. 29, § 5; see pp. 27-29, *infra*. See generally L. FREDMAN, THE AUSTRALIAN BALLOT 46-48 (1968); C. MERRIAM & L. OVERACKER, PRIMARY ELECTIONS (1928). State laws also restrict appearance on printed ballots in the primary elections, generally to persons collecting sufficient signatures, paying fees, meeting party affiliation requirements, and not being subject to various disqualifications. See pp. 28, 74a-80a, *infra*.

to this Court that the ballot restriction established a new qualification for election to the House, and that Article I implicitly forbade this. After rejecting a First and Fourteenth Amendment challenge, this Court disposed of the Article I argument in a footnote:

"Appellants also contend that [the State law] purports to establish an additional qualification for office of Representative and is invalid under Art. I, § 2, cl. 2, of the Constitution. The argument is wholly without merit."

415 U.S. at 746 n.16. This Court characterized the law as "an absolute bar to candidacy, and a valid one." *Id.* at 737. But with respect to Article I, it explained,

"The non-affiliation requirement no more establishes an additional requirement for the office of Representative than the requirement that the candidate win the primary to secure a place on the general ballot or otherwise demonstrate substantial community support."

Id. at 746 n.16. This Court also pointed out the availability of election by write-in. *Id.* at 736 n.7.

Other cases follow the same reasoning. As the First Circuit explained,

"the test to determine whether or not the 'restriction' amounts to a 'qualification' . . . is whether the candidate 'could be elected if his name were written in by a sufficient number of electors.'"

Hopfmann v. Connolly, 746 F.2d 97, 103 (1st Cir. 1984), *vacated in part on other grounds*, 471 U.S. 459 (1985), *quoting in part State ex rel. Johnson v. Crane*, 65 Wyo. 189, 206-07, 197 P.2d 864, 871 (1948). Similarly, the Ninth Circuit cited this Court's decision in *Storer* in holding that a state law forbidding state officials to run for Congress while in office was not an Article I qualification, even though it had the practical effect of chilling candidacy by persons who did not want to give up their jobs. *Joyner v. Mofford*, 706 F.2d 1523, 1531 (9th Cir.), *cert. denied*, 464 U.S. 1002 (1983). Many other cases stand for the rule that state ballot

regulations are limited under the federal Constitution not by Article I but, if at all, by the Fourteenth Amendment or other explicit restrictions on state laws.²⁰

B. The Record Does Not Support the Assumption That Established Incumbents Cannot Win Reelection by Write-In.

The linchpin of the Arkansas plurality's reasoning, on which its entire opinion depended, was an assertion: that a long-term incumbent's opportunity to win reelection by write-in was insignificant. The plurality opinion acknowledged, and held as a matter of state law, that under Amendment 73 a long-serving congressional incumbent "is not totally disqualified and might run as a write-in candidate," and also might serve if appointed by the governor to fill a vacancy. P.C.A. 15a. But it dismissed those avenues to holding office in a single sentence:

"These glimmers of opportunity for those disqualified, though, are faint, indeed—so faint in our constitutional judgment that they cannot salvage Amendment 73 from constitutional attack."

Id. No evidence was presented to the state courts to support that conclusion, other than election statistics showing that obscure write-in candidates do not win elections. As its only authority, the opinion cited a district court opinion that—relying on a comparable metaphor—had scoffed at the write-in option available under Washington's similar law.²¹

²⁰ *E.g.*, *Public Citizen, Inc. v. Miller*, 992 F.2d 1548 (11th Cir. 1993), *affirming* 813 F. Supp. 821, 833 (N.D. Ga. 1993); *State ex rel. O'Sullivan v. Swanson*, 127 Neb. 806, 808, 257 N.W. 255, 255-56 (1934); *State ex rel. McCarthy v. Moore*, 87 Minn. 308, 92 N.W. 4 (1902).

²¹ *Thorsted v. Gregoire*, *supra*, 841 F. Supp. 1068, 1079 (W.D. Wash. 1994) ("a pinhole of opportunity"), *appeal pending sub nom. Thorsted v. Munro*, Nos. 94-35222 etc. (9th Cir.), *cert. denied sub nom. Citizens for Terms Limits v. Foley*, 114 S. Ct. 2727 (1994). The Washington court issued its opinion on summary judgment in the face of affidavits of experts, both political scien-

The opinion's absolute assertion is contrary to the record and historically incorrect.²² For example, three current Members were once elected to Congress by write-ins, J.A. 172-77—including one who had unsuccessfully sought ballot access in that very election.²³ Other congressional write-ins have succeeded, J.A. 202, including one from Arkansas itself. J.A. 169-70, 201-02. The better known the candidate, the greater the opportunity for success. J.A. 201, 203. In fact, the Arkansas Supreme Court had before it a political scientist's uncontroverted affidavit, J.A. 201, 203-04, that

"although a write-in candidacy is more difficult to win than one in which a candidate's name is on the ballot, it is far from impossible for a write-in candidate to win, especially if the write-in candidate has substantial name identification. . . . Most write-in candidacies in the past have been waged by fringe candidates, with little public support and extremely low name identification. In instances when write-in candidates have been well known, however, they often have been successful. . . . The typical write-in incumbent almost certainly will have a higher name recognition, more sophisticated campaign skills, ongoing endorsements from political allies and newspapers, a well-honed talent for working the media, the good will of constituents, and a much larger campaign fund than the non-incumbents on the ballot Given a choice, any rational candidate would prefer to be a well known incumbent write-in candidate

tists and former congressmen, that a well-known incumbent would have a powerful opportunity to win as a write-in candidate.

²² Lacking any evidentiary foundation, the ruling is one of law. Even if treated as a factual finding, the state court's conclusion still would not bind this Court insofar as a determination of federal law depends on it. *E.g.*, *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 659 (1945), and cases there cited.

²³ See J.A. 175-76 (Rep. Skeen): *Skeen v. Hooper*, 631 F.2d 707, 711 (10th Cir. 1980) (rejecting claim "[t]hough write-in campaigns are generally a difficult thing"), citing *Jenness v. Fortson*, 403 U.S. 431, 434 (1971).

rather than a political novice who happens to have his or her name printed on the ballot."

Even in the context of little-known candidates, this Court, unlike the Arkansas court, has often treated the availability of write-in election as significant in rejecting Fourteenth Amendment challenges to election laws.²⁴ This Court also holds, moreover, that *a priori* characterizations are not adequate, and requires that a ballot regulation not be held unduly burdensome without proper findings of fact. *Mandel v. Bradley*, 432 U.S. 173, 178 (1977); *Storer v. Brown*, *supra*, 415 U.S. at 742. On the present record, the only possible findings would be exactly contrary to the decision on review.

C. The Benefit of Continued Ballot Access Is Less Crucial for Long-Time Incumbents.

1. Congressional Incumbents Receive Many Other Benefits.

Long-time congressional incumbents are not ordinary candidates. Placed at their disposal are taxpayer-furnished staffs, expense accounts, offices in their districts, media broadcast studios and press aides, travel allowances, free postage privileges, free stationery, easy access to television news and talk shows, and abundant oppor-

²⁴ See *Storer v. Brown*, *supra*, 415 U.S. at 736 n.7 ("we note that the independent candidate who cannot qualify for the ballot may nevertheless resort to the write-in alternative provided by California law"); *Jenness v. Fortson*, *supra*, 403 U.S. at 434, 438 ("Georgia freely provides for write-in votes. . . . no limitation whatever . . . on the right of a voter to write in on the ballot the name of the candidate of his choice and to have that write-in vote counted"). In two special situations—where state election laws imposed unreasonably high filing fees, or effectively destroyed "the constitutional right of citizens to create and develop new political parties," *Norman v. Reed*, 112 S. Ct. 698, 705 (1992)—this Court held that the restriction violated the Fourteenth Amendment even when tempered by the write-in alternative. See *Anderson v. Celebrezze*, 460 U.S. 780, 799 n.26 (1983); *Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974); see also *id.* at 722 (Blackmun, J., joined by Rehnquist, J., concurring) ("I would regard a write-in procedure, free of fee, as an acceptable alternative").

tunities to perform constituent services that increase with seniority and encourage campaign contributions.²⁵

"Incumbent candidates, of course, can deliver more immediate legislative results than mere challengers. This fact enables them to raise much more money for the next campaign than their challengers, giving incumbents an enormous advantage in primary and general elections. They not only have more money; they have it much earlier, a factor that discourages many would-be challengers from even making the race. In 1986, an astounding ninety-eight percent of all House incumbents of both parties who ran for reelection were reelected. Equally astounding, over the past thirty years a weighted average of ninety percent of all House and Senate incumbents of both parties who ran for reelection were reelected, even at times when their own party lost control of the Presidency itself."

Lloyd N. Cutler, *Now Is the Time for All Good Men*. . . , 30 WM. & MARY L. REV. 387, 394-95 (1989) (footnote omitted).

Since World War II, the reelection advantages of congressional incumbents have expanded, and prolonged incumbency has burgeoned. In 1992, 88% of House incumbents and 82% of Senate incumbents who ran were reelected. See, e.g., Frenzel, *Term Limits and the Immortal Congress*, BROOKINGS REV. 18, 21 (Spring 1992) (retired congressman cites overwhelming advantages of incumbency and need "to unrig a rigged system"); G. WILL, RESTORATION 73-89 (1992) (collecting data on sharp increase in congressional incumbency). What the voters who enacted Amendment 73 decided was simply

²⁵ See, e.g., 39 U.S.C. §§ 3210, 3211, 3212 (franked mail, including "mass mailings"); 2 U.S.C. §§ 123b, 123b-1 (House and Senate recording studios); 2 U.S.C. § 58a (telecommunications services); 2 U.S.C. §§ 57, 58c (office expense allowances); 2 U.S.C. §§ 61-1, 332 (personal staffs); 2 U.S.C. § 72a (committee staffs); 2 U.S.C. §§ 43, 43b, 58 (travel allowances); 2 U.S.C. § 46b-1 (stationery); 2 U.S.C. §§ 57, 59 (offices in districts and home states). See also S. Res. 63, 103d Cong., 1st Sess. (1993) (authorizing U.S. Senate Counsel's representation of respondent Bumpers in this case, citing 2 U.S.C. § 288c(a) (1); see J.A. 89, 178).

not to continue to add the benefit of appearing on the printed ballot to the many other advantages multi-term incumbents already enjoy.²⁶

The States have a well recognized interest in the fairness and openness of elections, and in encouraging "the potential fluidity of American political life." *Jenness v. Fortson*, 403 U.S. 431, 439 (1971). In advancing electoral objectives, they often distribute state benefits unequally among candidates. Many States have laws, of which the one in *Storer* is one example, designed to help major parties by discouraging "sore loser" or "spoiler" candidacies and "party raiding." *Burdick v. Takushi*, *supra*, 112 S. Ct. at 2066-67; see also *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973). Campaign finance laws now often restrict the contributions challengers are able to raise to increase their name recognition. Cf. *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding campaign-financing provisions of Federal Election Campaign Act). Certainly to try to limit the benefits some already governmentally advantaged candidates receive is not prohibited by the Constitution's listing of minimum qualifications for office in Article I.

2. State Election Laws Often Unequally Favor Incumbents.

The Arkansas plurality believed that by attempting to encourage challenges to incumbents, Amendment 73 ex-

²⁶ Eight other States by initiatives enacted restrictions on continued ballot access of long-time congressional incumbents. Ariz. Const., art. VII, § 18; Cal. Elec. Code § 25003; Fla. Const., art. 6, § 4; Mont. Const., art. IV, § 8; Neb. Const., art. XV, § 19; N.D. Cent. Code § 16.1-01-13.1; Wash. Rev. Code § 29.68; Wyo. Stat. § 22-5-104. Enforcement of the Washington statute has been enjoined by a district court, *Thorsted v. Gregoire*, *supra*, and the Nebraska provision after approval by 68% of the voters was held nevertheless invalid for insufficient signatures on the petition that put it on the ballot. *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994). In addition, term limits for congressional incumbents have been adopted in six States. Colo. Const., art. XVIII, § 9; Mich. Const., art. 2, § 10; Mo. Const., art. III, § 45(a); Ohio Const., art. V, § 8; Ore. Const., art. II, § 20; S.D. Const., art. III, § 32.

ceeded "the general power of the states to regulate federal elections." P.C.A. 14a. But state laws affecting the conduct of congressional elections inevitably, and often designedly, influence results. Virtually any state election law—even determining the location of voting places, or how long the polls are open—will work to the advantage of some candidates over others. See *Burdick v. Takushi*, *supra*, 112 S. Ct. at 2063; *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Apart from congressional overruling, such laws are constrained not by Article I's minimum qualifications, but rather by the Fourteenth Amendment, which provides a check on arbitrary state regulations.

"[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions."

Burdick v. Takushi, *supra*, 112 S. Ct. at 2063-64, quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Thus in *Moore v. McCartney*, 425 U.S. 946 (1976), this Court held no substantial federal question was presented by an appeal challenging term limits for state officials under the Fourteenth Amendment.²⁷

²⁷ Federal courts and state supreme courts, with the exception of the district court in *Thorsted v. Gregoire*, *supra*, have invariably sustained state laws that prescribe actual term limits against First and Fourteenth Amendment challenges—just as the Arkansas court did here with respect to Amendment 73's term limits on state officials. P.C.A. 20a, 27a, 42a. "[T]he mere fact that a State's system 'creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.'" *Burdick v. Takushi*, 112 S. Ct. 2059, 2063 (1992), quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972). The highest courts of California, New York, and West Virginia have held that term limits have ample and compelling justification, and that they promote rather than impede the values the Fourteenth Amendment protects. They are neither arbitrary nor irrational, are content-neutral, and do not disable a protected class or disfavor particular beliefs.

"Voters retain the ability to vote for any qualified candidate holding the beliefs or possessing the attributes they may

The Arkansas opinions did not explain why, if declining to continue to print the name of a multi-term incumbent on the ballot establishes a qualification like those in Article I, the same is not true also of Arkansas' (and forty-nine other States') many other laws that tightly restrict ballot access—such as Arkansas' law limiting places on the general-election ballot to party nominees unless sufficient voters petition, or its law prohibiting independent candidacies of primary losers.²⁸ It is difficult to imagine a state ballot law more outcome-determinative in general elections to Congress than the familiar laws that effectively restrict appearance on the ballot to primary winners.

In fact, this Court has held that state congressional election laws may take incumbency into account—by encouraging it. States may help incumbents by drawing congressional district lines so as to "avoid[] contests between incumbent Representatives." *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). They may "aim[] at maintaining

desire in a public officeholder. Under these circumstances, First Amendment protection of political expression and promotion of the marketplace for ideas continue unabated."

Legislature v. Eu, 54 Cal. 3d 492, 519, 816 P.2d 1309, 1325 (1991), cert. denied, 112 S. Ct. 1292 (1992); accord, *Roth v. Cuevas*, 82 N.Y.2d 791, 624 N.E.2d 689 (1993), affirming 158 Misc. 2d 238, 603 N.Y.S.2d 962 (1993); *State ex rel. Maloney v. McCartney*, 159 W. Va. 513, 517, 223 S.E.2d 607, 611, appeal dismissed sub nom. *Moore v. McCartney*, 425 U.S. 946 (1976). Cf. also U.S. Constitution, Twenty-second Amendment. About half the states limit the terms of governors. *Miyazawa v. City of Cincinnati*, 825 F. Supp. 816, 821 (S.D. Ohio 1993). See generally *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); *American Party v. White*, 415 U.S. 767 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971).

²⁸ Arkansas limits ballot access to nominees of an organized political party by primary or convention, unless by petition of 3% of the electors (Ark. Const., amend. 29, § 5; Ark. Code Ann. § 7-7-103); prohibits primary losers from running as independents (Ark. Code Ann. §§ 7-7-103(f), 7-8-101); requires fees and pledges of party loyalty for access to a primary-election ballot (Ark. Code Ann. § 7-7-301); prohibits certain groups from ballot access (Ark. Code Ann. § 7-3-108); and requires notice of intention to be a write-in candidate (Ark. Code Ann. § 7-5-205). See Appendix F pp. 43a-53a, *infra*.

existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation may have achieved in the United States House of Representatives." *White v. Weiser*, 412 U.S. 783, 791 (1973).²⁹ The entire process of congressional redistricting—for which the States have primary responsibility, *Grove v. Emison*, 113 S. Ct. 1075, 1081 (1993)—is permeated with States' result-oriented decisions:

"Politics and political considerations are inseparable from districting and apportionment. . . . District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences."

Gaffney v. Cummings, 412 U.S. 735, 753 (1973); see also *White v. Weiser*, *supra*, 412 U.S. at 795-96. This Court seldom has been persuaded that even the Fourteenth or Fifteenth Amendment requires overturning state districting laws that favor particular results, or even particular political parties. "The fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness." *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966). See also *Voinovich v. Quilter*, 113 S. Ct. 1149, 1156 (1993) (racial-majority districting under Voting Rights Act); *Davis v. Bandemer*, 478 U.S. 109 (1986).

Arkansas' own congressional districts have been explicitly arranged to minimize disruption to incumbents. The court in *Doulin v. White*, 535 F. Supp. 450, 452

²⁹ Madison told the Convention that he expected state legislatures acting under Article I, § 4, "so to mould their regulations as to favor the candidates they wished to succeed." 2 FARRAND 241. As a counterbalance Congress was given "controlling power" to override them. *Id.*

(E.D. Ark. 1982), repeatedly cited *White v. Weiser*, *supra*, in stressing that the districts selected "would disrupt existing patterns of constituency-representative relationships far less than Plan A." See also *Turner v. Arkansas*, 784 F. Supp. 585, 588 (E.D. Ark. 1991) (districting in 1991 made "as few changes as possible" to *Doulin* plan). If Article I's minimum qualifications do not stand in the way of state primary laws that keep many categories of candidates off the ballot, and state districting laws that protect incumbency, surely they do not prevent the people of Arkansas from trying to enlarge the political process by a law that favors no group or political view, but encourages new participation.

III. STATE LIMITS ON TERMS IN CONGRESS WOULD NOT VIOLATE ARTICLE I.

Although the voters of Arkansas did not decide to enact term limits for members of Congress, they could constitutionally have done so. Nothing in the Constitution says otherwise; on the contrary, the Constitution confirms broad state power to regulate elections to Congress. Nor do the usual rules of constitutional construction suggest such a prohibition by implication. Moreover, laws enacted at the time of the adoption of the Constitution are "contemporaneous and weighty evidence of its true meaning." *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888). The contemporary practice confirms that the States may, consistently with Article I, set term limits for their representatives in Congress.

A. Contemporaneous Practice Emphatically Confirmed State Power.

1. *The States Have Enacted Additional Qualifications Since 1788.*

(a) *The Early Laws.*

As soon as they ratified the Constitution, the States began to pass laws regulating elections to the House of Representatives. And many of those laws imposed additional qualifications of many kinds for congressional office. Virginia, the largest and most populous State,

added both a land-ownership requirement and an additional residence requirement. It provided that the voters

"shall assemble at their respective county court-houses on the second day in *February* next, and then and there vote for some discreet and proper person, *being a freeholder*, and who shall have been a *bona fide resident for twelve months within such district*, as a member to the House of Representatives for the United States."³⁰

Georgia allowed voting only for someone who "shall be a resident of three years standing in the district," North Carolina for one year in the district. Maryland and Massachusetts also required that candidates be residents of their respective districts. Delaware required voting for two candidates, at least one from a different county. New Jersey established a preliminary nominating process, and provided that "no Person whatever shall be set up as a Candidate on the said Day of Election, but the Persons so nominated and returned as aforesaid." Connecticut did the same. Tennessee, admitted in 1796, included in its election law for Members of Congress a requirement "That the person elected shall have been a citizen or resident of this State, three years next immediately preceding the day of election." Some of the States described these as regulations of times, places and manner.³¹ In addition, Maryland specified residency locations for each senator, and Pennsylvania's congressional term-limits requirement continued in effect.³² Congress never exercised

³⁰ Va. Act of Nov. 20, 1788, ch. 2, § II (second and third emphases supplied); see also Va. Act of Dec. 26, 1792, ch. 1, § II.

³¹ Ga. Act of Jan. 23, 1789, p. 247; N.C. Act of Dec. 16, 1789, ch. 1, § I; Md. Act of Dec. 22, 1788, ch. 10, § VII; Mass. Res. of Nov. 19, 1788, ch. 49; Del. Act of Oct. 28, 1788; N.J. Act of Nov. 21, 1788, ch. 241, § 3; Conn. Res. of Oct. 9, 1788; Conn. Act of Jan. 1, 1789; Tenn. Act of Aug. 3, 1796, ch. 1, § 2. See Appendix C, pp. 8a-18a, *infra*; cf. *Quinn v. Millsap*, 491 U.S. 95 (1989) (property qualification for office violates Fourteenth Amendment).

³² See nn. 4, 7, *supra*; Pa. Const., § 11 (1776) ("No man shall sit in congress longer than two years successively, nor be capable of reelection for three years afterwards").

its power under Article I, § 4, to override any such state laws.

The state election laws are an instance of "the contemporaneous practical exposition of the Constitution being too strong and obstinate to be shaken or controlled." *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). "As this Court has stated from its first Due Process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2339 (1994); see also *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 412 (1928); *Stuart v. Laird*, 1 Cranch 299, 309 (1803) (early practice "an irresistible answer"). Here "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921); see also *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

(b) *The Current Laws.*

Over the years the subjects of state laws barring from congressional election have multiplied. Familiar examples are widespread state requirements that a candidate must be a registered voter—laws that thus sweep in all the various grounds for which States deny the franchise.³³ Among those grounds are conviction for felony or particular crime,³⁴ although some States simply deny election to felons outright.³⁵ Laws barring mental incompetents are similar.³⁶ A few States require residency in the

³³ *E.g.*, Nev. Const., art. 15, § 3; Miss. Const., art. 12, § 250; Appendix G, pp. 54a, 57a-67a, *infra*. Until the Nineteenth Amendment, this was the means by which most States prevented women from being candidates. For a summary of nineteenth-century state restrictions, see *Minor v. Happersett*, 21 Wall. 162, 172-73, 176-77 (1875).

³⁴ N.J. Stat. Ann. §§ 19:4-1, 19:13-8; Ala. Const., art. VIII, § 182; Ala. Code § 17-16-12; Appendix G, pp. 57a-65a, *infra*.

³⁵ *E.g.*, Ark. Code Ann. § 16-90-112(b); Ariz. Rev. Stat. Ann. § 13-904; N.H. Rev. Stat. Ann. § 607-A:2. Felons may constitutionally be disenfranchised. *Richardson v. Ramirez*, 418 U.S. 24 (1974).

³⁶ *E.g.*, Ariz. Rev. Stat. Ann. §§ 16-101, 16-311; N.D. Const., art. 2, § 2; N.D. Cent. Code § 44-01-01; Appendix G, pp. 65a-67a, *infra*.

congressional district;³⁷ some add requirements of specified time as a state resident³⁸ (often indirectly through requirements that candidates must be voters). There are numerous particular variations as well—for example, requirements of loyalty oaths, or bans on candidacy for two offices.³⁹ Arkansas disqualifies from seeking re-election any Senator appointed by the governor; it also bars from appointment as Senator the governor, lieutenant governor, and their relatives. Ark. Const., amend. 29, § 2.

State laws that deny ballot access except to persons who win a party nomination or secure a substantial number of petition signatures are nearly universal.⁴⁰ They are laws that this Court holds States have an “undoubted right to require.” *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986); *American Party v. White*, 415 U.S. 767 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971). Access to primary-election ballots is also tightly restricted, with requirements of time in the party, and disaffiliation from others. Primary-election losers are often then barred from the general election ballot, as by the California law this Court upheld in *Storer v. Brown*, and by Arkansas.⁴¹

³⁷ *E.g.*, Idaho Code § 34-1904; Nev. Rev. Stat. § 293.1755; Appendix G, pp. 54a-55a, *infra*.

³⁸ *E.g.*, Idaho Code §§ 34-604, 34-605; Colo. Rev. Stat. § 1-4-802; Appendix G, pp. 55a-57a, *infra*.

³⁹ *E.g.*, Pa. Stat. Ann., tit. 25, § 2938.1; Maine Rev. Stat. Ann., tit. 21-A, § 331(3); Appendix G, pp. 67a-69a, 86a-87a, *infra*.

⁴⁰ See, *e.g.*, Ark. Const., amend. 29, § 5; Ark. Code Ann. §§ 7-7-301 *et seq.*; Cal. Elec. Code §§ 6831, 6838; Ind. Code § 3-8-2-8; N.Y. Elec. Law § 6-142; Appendix G, pp. 74a-75a, *infra*; see also, *e.g.*, *Gardner v. Ray*, 154 Ky. 509, 157 S.W. 1147 (1913) (statute prescribing qualifications for party nomination is constitutional); *Secretary of State v. McGucken*, 244 Md. 70, 222 A.2d 693 (1966) (candidates required to appoint campaign treasurer).

⁴¹ *E.g.*, Ark. Code Ann. § 7-7-103(f); Colo. Rev. Stat. § 1-4-105; Ill. Ann. Stat., ch. 10, § 5/10-2; Kan. Stat. Ann. § 25-202(c); Md. Ann. Code, art. 33, § 8-2; Neb. Rev. Stat. § 32-516; N.H. Rev. Stat. Ann. § 659:91-a; N.C. Gen. Stat. § 163-123(e); N.D. Cent. Code § 16.1-13-06; S.C. Code Ann. § 7-11-210; Tenn. Code Ann. § 2-5-101(f); see Appendix G, pp. 81a-85a, *infra*.

Some such “spoiler” laws even bar subsequent candidacy as write-ins.⁴²

This Court has also upheld state laws that broadly forbid large groups of governmental officials and employees from running for Congress. See *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *cf. Clements v. Fashing*, 457 U.S. 957, 972 (1982) (automatic loss of state office upon becoming candidate for offices that included Congress). In those First and Fourteenth Amendment cases, the litigants did not even bother to assert that Article I could prevent such prohibitions of congressional candidacy, and this Court gave no hint of any such concern.⁴³ It is “settled doctrine” that “a public body may forbid its employees to run for elective office,” and that such restrictions may apply to “policymaking officials.” *Wilbur v. Mahan*, 3 F.3d 214, 219 (7th Cir. 1993) (Easterbrook, J., concurring); see also, *e.g.*, *Smith v. Ehrlich*, 430 F. Supp. 818 (D.D.C. 1976) (three-judge court) (private persons receiving government funds disqualified).⁴⁴

⁴² *E.g.*, Ga. Code Ann. § 21-2-133(d); Neb. Rev. Stat. § 32-516; N.C. Gen. Stat. § 163-123(e).

⁴³ The Oklahoma statute upheld in *Broadrick* provided that “No employee in the classified service shall be . . . a candidate for nomination or election to any paid public office” See 413 U.S. at 604 n.1. The Hatch Act forbids running as a candidate for “partisan political office.” See 5 U.S.C. §§ 7322(1), 7323(a)(3). It was upheld in *U.S. Civil Service Comm’n v. National Ass’n of Letter Carriers*, 413 U.S. 548 (1973), and *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). See generally Appendix G, pp. 69a-74a, *infra*.

⁴⁴ A handful of state disqualification laws were held unconstitutional in decisions offering little analysis except the assertion that States could not add qualifications, and no attempt to deal with the many other instances in which States did. *E.g.*, *Danielson v. Fitzsimmons*, 232 Minn. 149, 44 N.W.2d 484 (1950) (felony disqualification); *Exon v. Tiemann*, 279 F. Supp. 609 (D. Neb. 1968) (district residency requirement); see pp. 46-47, *infra*. For a listing of the variety of state qualification laws as of 1889, see Brief of Petitioner in No. 93-1828, Appendix C.

2. Congress Has Enacted Additional Disqualifications Since 1789.

Congress itself has not hesitated to pass statutes that disqualify categories of individuals from public office. It began to do so in the very first session of the First Congress in 1789.⁴⁵ It did so again in 1790⁴⁶ and 1792 and 1793.⁴⁷ It continued thereafter regularly to enact laws that barred persons convicted of specified crimes from holding federal office.⁴⁸ Several of these disqualification laws, indeed, have applied only to members of Congress. *E.g.*, Act of July 16, 1862, ch. 180, 12 Stat. 577 (Member of Congress taking money for procuring government contracts); Act of June 11, 1864, ch. 119, 13 Stat. 123

⁴⁵ Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 67 (Treasury official acting with conflict of interest "forever thereafter incapable of holding any office under the United States"). Seventeen of the Members of the First Congress, including Madison, had been delegates to the Constitutional Convention. *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). They recognized that "the whole business of Legislation was a practical construction of the powers of the Legislature . . ." 2 ANNALS OF CONG. 1960 (1791) (Gales & Seaton ed.) (Rep. Sedgwick); see also 1 *id.* at 514 (Rep. Madison). "[T]he First Congress was a sort of continuing constitutional convention." Currie, *The Constitution in Congress*, 61 U. CHI. L. REV. 775, 777 (1994). Its actions "have always been regarded . . . as of the greatest weight in the interpretation of that fundamental instrument." *Myers v. United States*, 272 U.S. 52, 174-75 (1926). See also *Marsh v. Chambers*, 463 U.S. 783, 790 (1983); *Carroll v. United States*, 267 U.S. 132, 150-53 (1925).

⁴⁶ Act of April 30, 1790, ch. 9, § 21, 1 Stat. 117 (bribery of judge). This provision reflects that the First Congress "did not understand impeachment to be the sole avenue for future disqualification of current officeholders." Currie, *supra* n.45, at 833 n.342.

⁴⁷ Act of May 8, 1792, ch. 37, § 12, 1 Stat. 281 (extending penalties of 1789 Act to other officials); Act of Dec. 31, 1792, ch. 1, § 26, 1 Stat. 298 (offenses by collectors and other officers), see 46 U.S.C. § 322; Act of Feb. 13, 1793, ch. 8, § 29, 1 Stat. 315 (same), see 46 U.S.C. § 59.

⁴⁸ See, *e.g.*, Act of Feb. 26, 1853, ch. 81, § 5, 10 Stat. 170; *id.*, § 6, 10 Stat. 171; Act of July 2, 1862, ch. 128, 12 Stat. 502; Act of July 17, 1862, ch. 195, §§ 1-3, 12 Stat. 589; Act of Feb. 25, 1865, ch. 52, §§ 1, 2, 13 Stat. 437, now 18 U.S.C. §§ 592, 593.

(Member of Congress accepting compensation when United States is a party); Act of March 3, 1911, ch. 231, § 144, 36 Stat. 1136, as amended, 18 U.S.C. § 204 (1988 ed.) (Member of Congress practicing in Claims Court). Noting such early federal legislation, Professor Corwin rejected "the dogmatic assertion that anybody who possesses the constitutionally stipulated qualifications of a President is under all circumstances qualified in the contemplation of the Constitution to be President." E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 33 (4th rev. ed. 1957). As was explained in *De Veau v. Braisted*, 363 U.S. 144, 159 (1960) (Frankfurter, J., announcing judgment),

"Federal law has frequently and of old utilized this type of disqualification [A] large group of federal statutes disqualify persons 'from holding any office of honor, trust, or profit under the United States' because of their conviction of certain crimes, generally involving official misconduct. 18 U.S.C. §§ 202, 205, 206, 207, 216, 281, 282, 592, 1901, 2071, 2381 [1958 ed.]. For other examples in the federal statutes see 18 U.S.C. § 2387; 5 U.S.C. § 2282; 8 U.S.C. § 1481 [1958 ed.]."

Several such provisions are in the current *United States Code*.⁴⁹

⁴⁹ They include 18 U.S.C. § 201(b) (4) (witness seeking or accepting bribe); 18 U.S.C. § 592 (keeping troops at polls); 18 U.S.C. § 593 (member of armed forces who interferes with elections); 18 U.S.C. § 1901 (revenue officer who trades in public property); 18 U.S.C. § 2071(b) (custodian who destroys public records); 18 U.S.C. § 2381 (treason); 18 U.S.C. § 2383 (rebellion or insurrection); 5 U.S.C. § 7311 (striking against the government or advocating its overthrow); 5 U.S.C. § 7313 (felony riot or disorder); 46 U.S.C. §§ 59, 322 (willful neglect by maritime officers). Until recent amendments, several other crimes also were punished by disqualification from office. See, *e.g.*, 18 U.S.C. §§ 203(a), 204 (1988 ed.); see also Federal Election Campaign Act Amendments, Act of Oct. 15, 1974, § 407, 88 Stat. 1263, 1290 (reporting-requirement violator "shall be disqualified from becoming a candidate in any future election for Federal office" for a stated period; repealed by Act of May 11, 1976, §§ 111, 114, 90 Stat. 475, 486, 495, but with proviso

B. No Prohibition on Added State Qualifications Is Implied in the Constitution.

1. Withdrawals of State Power Are Rarely Implied.

The Arkansas court's holding that an unstated negative implication of Article I bars Amendment 73 reopens a very old question: when, if ever, will silence of the Constitution be held nevertheless to prohibit state power? "The principles which the Court has followed in construing state power were stated by Alexander Hamilton in Number 32 of *The Federalist*." *Goldstein v. California*, 412 U.S. 546, 552 (1973):

"[A]s the plan of the [Constitutional] convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*."

Id. at 552-53, quoting *THE FEDERALIST* No. 32 at 200 (emphasis and bracketed text in original). This Court through Chief Justice Marshall early explained that prohibitions on state power to legislate are not to be implied when the Constitution does not state them:

"[I]t was neither necessary nor proper to define the powers retained by the states. These powers proceed,

that repeal did not affect penalties already imposed). See generally Appendix E, pp. 25a-42a, *infra*. A dictum in *Burton v. United States*, 202 U.S. 344, 369-70 (1906), suggested that state legislatures' authority was so great that Senators did not even hold office under the government of the United States; so extreme a view would be inconsistent with a host of other decisions, *e.g.*, *United States v. Classic*, *supra*, 313 U.S. at 315; *Smiley v. Holm*, *supra*, 285 U.S. at 366-67.

not from the people of America, but from the people of the several states; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument."

Sturges v. Crowninshield, 4 Wheat. 122, 193 (1819) (state insolvency laws not supplanted by federal bankruptcy power); see also *Houston v. Moore*, 5 Wheat. 1 (1820) (states may discipline militia in federal service).⁵⁰ As Chief Justice Marshall also explained, when the Framers intended to withdraw a power from the States, they knew how to say so unambiguously. *E.g.*, Article I, § 10. When the Constitution has prohibitions,

"The question of their application to states is not left to construction. It is averred in positive words."

Barron v. Baltimore, 7 Pet. 243, 249 (1833).⁵¹ Concurrent state power is the usual expectation. *Cf. Tafflin v. Levitt*, *supra*, 493 U.S. at 458.

Only in a very few instances has this Court cautiously been willing to imply from constitutional silence a limitation on state legislative power. Most celebrated is the "audacious"⁵² doctrine of the "dormant" Commerce

⁵⁰ See also *McCulloch v. Maryland*, 4 Wheat. 316, 435 (1819), holding that "the power of taxation in the general and state governments is acknowledged to be concurrent," but that the Supremacy Clause of Article VI prevents states from taxing an instrumentality of the federal government.

⁵¹ Thomas Jefferson, whose political views on other issues were often unlike Marshall's, reasoned the same way. Letter to Joseph C. Cabell, Jan. 31, 1814, in 11 *WORKS OF THOMAS JEFFERSON* 381 (P. Ford ed. 1905). *Accord*, *Golden v. Prince*, 10 Fed. Cas. 542, 543 (C.C.D. Pa. 1814) (No. 5,509) (Justice Washington on circuit).

⁵² F. FRANKFURTER, *THE COMMERCE CLAUSE* 19 (1937) (observing that such an implied prohibition "would hardly have been publicly avowed in support of adoption of the Constitution"). *Cf. Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239 n.2 (1985) (Eleventh Amendment): "The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." Margins in several state ratifying conventions were

Clause. *Cooley v. Board of Wardens*, 12 How. 299 (1852), after reaffirming THE FEDERALIST No. 32, held that States were excluded from regulating those aspects of interstate commerce that "are in their nature national, or admit only of one uniform system, or plan of regulation." 12 How. at 318-19. Such a negative implication in the Commerce Clause was in many respects unique, and it reflected that a leading reason the Philadelphia Convention had assembled was to bring an end to interstate trade wars; otherwise, as Justice Jackson wrote for the Court, "the states were quite content with their several and diverse controls over most matters." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534 (1949). And even the "dormant" Commerce Clause leaves substantial range for state legislation. See, e.g., *Barclays Bank PLC v. Franchise Tax Board*, 114 S. Ct. 2268 (1994); *California v. Thompson*, 313 U.S. 109, 113 (1941).

Generally, the Constitution expects Congress, rather than some implied negative prohibition, to protect federal interests against the States. E.g., *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 479 (1974); accord, *Goldstein v. California*, *supra*, 412 U.S. at 571. And here, unlike provisions such as the Commerce Clause that never mention the States, Article I actually specifies in § 4 that, unless Congress supersedes, the States are to regulate the election of their representatives in Congress. If States abuse their power, as Hamilton recognized, Article I specifically assigns the solution to Congress. THE FEDERALIST No. 59 at 399.

Yet glaringly absent in this case is any action by Congress with respect to Amendment 73—even though

close; e.g., Massachusetts (187-168); New York (30-27); Virginia (89-79). See 2 ELLIOT 181, 413; 3 *id.* 654. See also *Tyler Pipe Industries, Inc. v. Washington State Dep't*, 483 U.S. 232, 263 (1987) (Scalia, J., concurring in part and dissenting in part) (questioning doctrine of "dormant" Commerce Clause). A constitutional prohibition of a state law with "great potential for disruption or embarrassment" of foreign affairs was implied in *Zschernig v. Miller*, 389 U.S. 429, 435 (1968).

it is Congress and its Members who presumably are directly affected. With ample and explicit constitutional authority for Congress to protect any federal interest, there is all the less reason to ask this Court to displace the role assigned Congress, and stretch to imply an unstated constitutional prohibition on state laws. The fact that Congress has not chosen to restrict such state laws "is . . . evidence that the preeminent speaker decided to yield the floor to others." *Barclays Bank PLC v. Franchise Tax Bd.*, *supra*, 114 S. Ct. at 2285.

2. Amendment 73 Does Not Affect Article I's Disqualifications.

The purpose of requiring minimum age, inhabitancy and citizenship was to ensure that Representatives were mature, familiar with the States they represent, and adequately attached to the United States. See, e.g., 1 FARRAND 375 (Mason); 2 *id.* 216-17 (Mason); 2 *id.* 268 (Gerry). None of those objectives is compromised in the slightest by Amendment 73, which does not contradict or seek to alter any of the disqualifications in Article I. Amendment 73 does not even deal with age, citizenship or inhabitancy. Even if Article I were read to withdraw all state legislative power on those three subjects, that would not mean that it invalidated state qualifications as to matters like long incumbency that Article I does not address at all.⁵³

It is difficult to conceive how the decision of the people of a State ahead of time not to return persons to Congress as their representative after many years of incumbency is any more a threat to the constitutional structure than if the people decide in a particular election not to re-elect a particular individual. Obviously the Framers did not believe it essential that all Members of Congress have sit for identical tenures, and of course Members

⁵³ Nor does Amendment 73 attempt to diminish the authority of each House under Article I, § 5, to judge its members' "Qualifications." By *Powell v. McCormack*, 395 U.S. 486 (1969), the latter term refers only to those listed in the Constitution itself. See p. 44, *infra*.

never have. The voters of Arkansas are regulating their own procedure for choosing representatives, no one else's. They are not threatening to alter the federal system. They are simply trying, by offsetting some of the advantages conferred on incumbents, to affect the character of representation the people of their State receive.

3. *Citizenship and Residency Were Determined by State Laws.*

The plurality of the Arkansas Supreme Court nevertheless believed that "if there is one watchword for representation of the various States in Congress, it is uniformity. . . . Piecemeal restrictions by State would fly in the face of that order." P.C.A. 14a. A concurring justice thought that "the specter of the hodge-podge of qualifications which a contrary holding might engender is daunting enough to swing the balance." P.C.A. 41a.

But the Framers did not expect uniformity.⁵⁴ They began by leaving voter qualifications for the House entirely up to the States, subject to the authority of Congress to enact laws requiring more uniformity.⁵⁵ That provision "was intended to avoid the consequences of declaring a single standard for exercise of the franchise in federal elections." *Tashjian v. Republican Party*, 479 U.S. 208, 227 (1986). And two of the three minimum requirements in Article I, §§ 2 and 3—citizenship and inhabitancy—at the time the Constitution was adopted depended entirely on State law.⁵⁶

⁵⁴ Hamilton expected a "material diversity" reflecting "diversity in the state of property, in the genius, manners, and habits of the people of the different parts of the union." *THE FEDERALIST* No. 60 at 404.

⁵⁵ James Madison explained in the Virginia convention that uniformity would be a responsibility of Congress, and that the states were "best acquainted with the situation of the people, subject to the controul of the general government, in order to enable it to produce uniformity, and prevent its own dissolution." 3 *FARRAND* 311-12.

⁵⁶ No federal definition of United States citizenship was established until the Fourteenth Amendment in 1868. The first proposed

When the Constitution demands uniformity, it generally says so—as in the authorization for a national bankruptcy law and naturalization law, and the requirement that State ports be treated equally. Art. I, § 8, cl. 4; Art. I, § 9, cl. 6. No such requirement is to be found in Article I, § 2 or § 3. If anything, by specifically authorizing state laws both in § 2 and § 4, Article I leaves the strong inference that in this area uniformity was not expected.

4. *Other "Qualification" Clauses Do Not Impliedly Bar State Laws.*

"[T]he Constitution's terms are illuminated by their cognate provisions." *Freytag v. Commissioner*, 111 S. Ct. 2631, 2644 (1991); see *Buckley v. Valeo*, *supra*, 424 U.S. at 124. No negative implication barring additions has been read into other "qualification" provisions of the Constitution:

—Article I, § 2, cl. 1, explicitly establishes the qualifications of voters for the House as those each State sets for the most numerous branch of its legislature. Yet the States are not prohibited by that provision or the Seventeenth Amendment from adopting voter qualifications for federal elections that are not identical to those for state elections. *Tashjian v. Republican Party*, 479 U.S. 208, 229 (1986).

—Also in spite of the voter qualifications established in Article I, § 2, Congress under Article I, § 4, may set a different age from what the States adopted. *Oregon v.*

naturalization law had a clause requiring one year of residency for citizenship; a congressman argued that Article I "had expressly said how long they should reside among us before they were admitted to seats in the Legislature; the propriety of annexing any additional qualifications is therefore much to be questioned." 1 *ANNALS OF CONG.* 1149 (1790) (Rep. Lawrence). But James Madison responded that "there is no doubt we may, and ought to require residence as an essential." *Id.* at 1150. Concern was expressed by all, however, as to whether the federal legislation would interfere with powers reserved to the States, and the provision was dropped. *Id.* at 1149-64.

Mitchell, 400 U.S. 112, 117-18 (1970) (Black, J., announcing judgment).

—Just as Article I disqualifies certain persons from serving in Congress, so Article II, § 1, cl. 2, disqualifies certain persons—Senators, Representatives, and others holding federal office—from being Presidential electors. Yet from the beginning, some states in addition required residency within a district, or even a county, for Presidential electors,⁵⁷ and two added landed property requirements.⁵⁸ This Court unhesitatingly upheld the States' authority to require election by district in *McPherson v. Blacker*, 146 U.S. 1, 27-35 (1892). Restrictions on state power to choose Presidential electors, this Court has held, must be found in the Fourteenth Amendment and similar provisions. *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

C. State Power Was Not Questioned When the Constitution Was Adopted.

1. *The Constitutional Convention.*

From the surviving records of Philadelphia, these points are clear:

(1) The Framers deleted a provision to make the qualifications in Article I exclusive.

(2) The Framers declined to add to the Constitution either

(a) a national requirement of property ownership or financial standing, or

(b) a national test for citizenship, or

(c) national term limits.

⁵⁷ Mass. Res. of Nov. 19, 1788 (district residency); Va. Act. of Nov. 17, 1788 (same); Del. Act of Oct. 28, 1788 (county residency). Several states included requirements of state residency. N.H. Act of Nov. 12, 1788; N.J. Act of Nov. 21, 1788; Pa. Act of Oct. 4, 1788. Maryland required that five Presidential electors be from the Western Shore, and three from the Eastern Shore. Md. Act of Dec. 22, 1788. See Appendix D, pp. 19a-24a, *infra*.

⁵⁸ N.J. Act of Nov. 21, 1788, § 8; Va. Act of Nov. 17, 1788.

(3) Some of the delegates expressed the belief that Congress would not be able to add qualifications for its own members; but neither they nor any other delegate ever questioned the power of the States to do so.

1. Bearing directly on the present case was a change made in the wording of what became Article I, § 2. The provision was drafted in the Committee of Detail, which wrote most of the Constitution. As reflected in the notes of Edmond Randolph, one of the Committee members, the provision originally read:

“5. The qualifications of (a) delegates shall be the age of twenty five years at least, and citizenship: (and any person possessing these qualifications may be elected except)”

2 FARRAND 139 (second emphasis supplied). If that language, or language like it, had been adopted, the Constitution would be a different document, and its listed disqualifications would exclude any others. But that language was *not* adopted. The exclusivity clause was *deleted* by the Committee. See *id.* at 178, 137 n.6. Thus the Framers rejected the very provision that the Arkansas court implied and added to the Constitution.⁵⁹

2. So distrustful were some delegates of long incumbency that they briefly considered adopting a national term limits requirement in 1787, then dropped it as “entering too much into detail for general propositions.” 1 FARRAND 50-51; see also *id.* 20, 210, 217. A version of such a provision had been part of the Articles of Confed-

⁵⁹ Later, in the last draft, the Committee of Style changed the phrasing to the negative (“No person shall . . .”) of the final version. The negative phrasing appears further confirmation that the provisions were simply setting minimums. This Court in *Powell v. McCormack*, *supra*, concluded that the Committee of Style had not intended to make a change of substance. 395 U.S. at 538-39. The negative wording did reflect, however, the earlier change of substance that had occurred when the Committee of Detail (which was charged with substantive aspects) had deleted the clause that would have made Article I, § 2's qualifications exclusive. The negative phrasing confirmed that decision.

eration,⁶⁰ and several States added limitations of their own. In the end the Framers put their trust in the frequent elections for the House which they adopted, concluding that a national constitutional requirement of "rotation" would not be necessary. 1 FARRAND 210, 217. Madison opposed a national requirement, and expressed confidence that "new members . . . would always form a large proportion" of the House of Representatives. 1 FARRAND 361. For most of this country's history, that faith of the Framers proved essentially correct. More recently it has not.

3. Although the Convention's discussion of proposed national term limits was brief, consideration of proposals that the Constitution require property ownership or disqualify debtors, or that Congress be specifically authorized to do so, was more extended. At no time did this discussion address state power to set qualifications. Rather, there was concern that national rules on those subjects would be too sweeping, and could not adequately reflect local conditions. 2 FARRAND 121, 122, 126. When it was proposed that Congress be authorized to enact property requirements, some delegates saw danger in allowing *the Congress*, with its inherent conflict of interest, to add qualifications that might be designed to benefit its incumbents. Madison worried, for example, about "vesting an improper & dangerous power in the [federal] Legislature," and others expressed concern that if Congress were "composed of any particular description of men, of lawyers for example, . . . the future elections might be secured to their own body." 2 FARRAND 250. In that context Madison urged that

"The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the [federal] Legislature could regulate those of either, it can by degrees subvert the Constitution."

⁶⁰ Articles of Confed., Art. V, provided for delegates to Congress to serve not more than "three years in any term of six years." Several states imposed additional limits. See nn. 7, 17, *supra*; see also Brief of Petitioner in No. 93-1828, Appendix B.

2 FARRAND 249-250 (emphasis supplied). As this Court has pointed out, "Madison's argument was not aimed at the imposition of a property qualification as such, but rather at the *delegation to the Congress* of the discretionary power to establish any qualifications." *Powell v. McCormack*, *supra*, 395 U.S. at 534 (emphasis supplied). When the handful of disqualifications in Article I was adopted, no one said they were exclusive, much less put such a proposition to a vote.

4. The delegates at all times recognized that the requirement of citizenship simply left the standard up to the varying laws of the States, subject to whatever naturalization laws Congress might enact. Hamilton argued for requiring "merely Citizenship & inhabitancy," arguing that "[t]he right of determining the rule of naturalization will then leave a discretion to the Legislature on this subject." 2 FARRAND 268. Madison agreed. *Id.*

5. There were several comments that the list of disqualifications should not be too long or detailed, lest it be misconstrued as having prevented further legislative action on the subject.

"Mr. Elsworth was for disagreeing to the remainder of the clause disqualifying public debtors; *and for leaving to the wisdom of the Legislature* and the virtue of the Citizens, the task of providing agst. such evils."

2 FARRAND 126 (emphasis supplied). John Dickinson "was agst. any recital of qualifications in the Constitution" because "[i]t was impossible to make a compleat one;" he worried that someone might argue that "a partial one would by implication tie up the hands of the Legislature from supplying the omissions." *Id.* 123. And James Wilson's objection to a specific provision authorizing Congress to set property qualifications was that "this particular power would constructively exclude every other power of regulating qualifications." *Id.* 251.

Thus in the surviving records of the drafting and ratification of the Constitution, although some delegates may

have doubted the power of *Congress*, there was not a single person who questioned the authority of the *States* to continue to set qualifications for their representatives to the national legislature. In fact, language to make the disqualifications in Article I exclusive was deleted.

2. *The Ratifying Conventions and The Federalist.*

What is striking in the state ratifying conventions is that the power granted Congress in Article I, § 4, was extremely controversial; the power of the States was not. Although opponents of the Constitution were quick to complain of every perceived limitation on state power, none suggested that the States were being denied the power to set qualifications for their representatives in Congress. The objections were to the breadth of the power in Article I, § 4, which it was feared the Congress would use to pass laws stripping the States of their control of elections to Congress. See p. 10, *supra*. *The Federalist* responded that the congressional power was essential to override what the States might do. See THE FEDERALIST NO. 59 at 399, 402-03 (Hamilton). More generally, in *The Federalist* No. 32, quoted by Chief Justice Marshall and many times since, see pp. 32-34, *supra*, Hamilton reassured that unstated restrictions on state power would not be implied. With respect to congressional elections in particular, Madison assured that

"The election of the President and Senate, will depend in all cases, on the Legislatures of the several States. And the election of the House of Representatives, will equally depend on the same authority in the first instance; and will probably, for ever be conducted by the officers and according to the laws of the States."

Id. No. 44 at 307. Hamilton reiterated that the Framers "have submitted the regulation of elections for the Federal Government, in the first instance, to the local administrations." *Id.* No. 59 at 399.⁶¹

⁶¹ "The new Constitution gives the people a fair opportunity to elect their Representatives for the general legislature. The state legislatures are to make the regulations and arrangements for the

When critics said Congress would too much favor the wealthy, Hamilton and Madison responded that *the Constitution* imposed minimal tests for membership and did not require any property qualifications, either for voters or members. Hamilton also believed that *Congress* would not be able to add qualifications:

"The truth is that there is no method of securing to the rich the preference apprehended but by prescribing qualifications of property *either for those who may elect or be elected*. But this forms no part of the power to be conferred *upon the national government*. Its authority would be expressly restricted to the regulation of the *times, the places, and the manner* of elections. The qualifications *of the persons who may choose or be chosen*, as has been remarked upon another occasion, are defined and fixed in the constitution, and are unalterable by the [federal] legislature."

Id. No. 60 at 408-09 (some emphases supplied). Madison had said much the same thing at the Convention, opposing the proposal to empower *Congress* to set property qualifications:

"The qualifications *of electors and elected* were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the [federal] Legislature could regulate those of either, it can by degrees subvert the Constitution."

2 FARRAND 249-50 (emphasis supplied).

By their own terms, these comments on the powers of Congress could not have been denying state power. For in each instance when Madison and Hamilton referred to qualifications being "fixed" by the Constitution, they referred in the very same sentence to qualifications of *voters* (electors) as well as of members of Congress: "qualifications of electors and elected" in Madison's words;

choice; and to make the privilege still more secure, these regulations are subject to the revision of the general legislature." *The Republican*, Jan. 7, 1788, in 3 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 530 (M. Jensen ed. 1978).

"qualifications of the persons who may choose or be chosen" in Hamilton's. Yet there was never any doubt that Article I, § 2, cl. 1, left the qualifications of voters entirely up to the legislature of each State (as long as they matched what the State set for voters for its lower house). Such qualifications were "fixed" by the Constitution only in the sense that Congress could not change them. Thus, "fixed" as used by Madison and Hamilton could not possibly have meant beyond the power of the state legislatures: otherwise the quoted statements, because they referred to voters as well as to representatives, would have made no sense.⁶²

D. This Court's Prior Decisions Recognize Legislative Power To Add Disqualifications.

In *Powell v. McCormack*, 395 U.S. 486 (1969), this Court interpreted the meaning of the word "Qualifications" in Article I, § 5, which provides that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members" ⁶³ This Court held that when a single House of the Congress was thus sitting in a quasi-judicial role pursuant to Article I, § 5, to "Judge" the qualifications of its members, then the only "Qualifications" that § 5 authorized it to apply were those specified in the Constitution, and not others that it might wish to add for the occasion. Cf. also *INS v. Chadha*, 462 U.S. 919 (1983) (single House may not exercise the lawmaking power of Congress).

Powell considered the authority of one House to exclude a person elected by the people of a State; not whether Article I excludes additional restrictions on being elected. This Court in *Powell* did not hold that the disqualifications in Article I, §§ 2 and 3, could not be added to by legislation, by the States or even by Congress. On

⁶² The same use of "fixed" occurs in Wilson Nicholas' explanation in the Virginia ratifying convention. 3 ELLIOT 8.

⁶³ "We held that, in light of the three requirements specified in the Constitution, the word 'qualifications'—of which the House was to be the Judge—was of a precise, limited nature." *Nixon v. United States*, 113 S. Ct. 732, 740 (1993).

the contrary, the opinion noted that although "petitioners argue that the proceedings [of the Constitutional Convention] manifest the Framers' unequivocal intention to deny *either branch of Congress* the authority to add to or otherwise vary the membership qualifications expressly set forth in the Constitution," nevertheless

"We do not completely agree, for the debates are subject to other interpretations."

395 U.S. at 532 (emphasis supplied).⁶⁴ And, far from addressing the power of the States to regulate the qualifications for Congress, the *Powell* opinion specifically put that issue aside: it pointed out that it was not deciding "the more narrow issue of the power of the States." 395 U.S. at 543.

That *Powell* did not reach beyond Art. I, § 5, was subsequently confirmed in *Buckley v. Valeo*, 424 U.S. 1 (1976). There this Court reiterated that Article I, "Section 5 confers . . . not a general legislative power upon the Congress, but rather a power 'judicial in character' upon each House of the Congress." 424 U.S. at 133. Far from suggesting that the minimum qualifications in the Constitution were exclusive, this Court in *Buckley* observed that under Article I, § 4, even Congress might add to them:

"Whatever power Congress may have to legislate, such qualifications must derive from § 4, rather than § 5, of Art. I."

Id. (emphasis supplied). When Congress legislates a disqualification, of course, it interferes with the right of the people of the States under Article I and the Seventeenth Amendment to choose their own representatives. A

⁶⁴ This Court went on to hold that the argument was acceptable only "in the context . . . of the distinction the Framers made between the power to expel and the power to exclude," i.e., only as a construction of Article I, § 5. 395 U.S. at 532. The opinion emphasized that if each House's power to exclude, exercised by majority vote, were not limited by this fixed standard, it would effectively supplant the limitation on the power to expel, Art. I, § 5, cl. 2, which requires a two-thirds vote. 395 U.S. at 536.

disqualification enacted by the people of the State themselves, however, does not—and can be overridden by Congress under Article I, § 4.⁶⁵

E. Other Sources Are Inconclusive.

1. House and Senate Seating Votes.

Occasionally members of the House and Senate in judging election contests under Article I, § 5, debated whether to honor state qualification laws. This Court in *Powell v. McCormack* held that “we are not inclined to give [Congress’] precedents controlling weight.” 395 U.S. at 547. The constitutional position taken by members, which sometimes changed, sometimes corresponded to their immediate political interests. See Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 261 (1941). This Court observed that “congressional practice has been erratic” and cautioned that even “[h]ad these congressional exclusion precedents been more consistent, their precedential value still would be quite limited.” 395 U.S. at 545-46 (footnote omitted).⁶⁶

2. Old Cases.

Some old cases from other courts have commented, often in dicta, that the disqualifications in Article I pre-

⁶⁵ In drafting the first clause of Article I, § 2, the originally proposed word “elected” was eliminated, in favor of the broader term “chosen . . . by the People.” See 2 FARRAND 129, 178. The Seventeenth Amendment was not intended to narrow this scope. Cf. *Newberry v. United States*, 256 U.S. 232, 250 (1921). Here it was “the People” of the State who exercised their constitutionally assigned choice when they adopted Amendment 73. They could also repeal it at any time. Ark. Const., amend. 7.

⁶⁶ In one early dispute, cited by the Arkansas plurality, P.C.A. 13a, a House committee recommended not to honor Maryland’s added requirement of district residency. However, the full House rejected the committee’s report and declined to decide that the Maryland law was unconstitutional. See M. CLARKE & D. HALL, *CASES OF CONTESTED ELECTIONS IN CONGRESS* 167, 169-71 (1834). Representative Randolph argued that “the Constitution merely enumerated a few *disqualifications* within which the States were left to set.” 17 ANNALS OF CONG. 883 (1807) (emphasis in original).

cluded the States from adding others. Several of these opinions, invalidating state prohibitions on officials running for Congress, were effectively disapproved by this Court’s decision in *Clements v. Fashing*, *supra*.⁶⁷ Others simply provided no reasoning or simply cited Justice Joseph Story’s treatise or, in more recent years, misread *Powell’s* Article I, § 5, holding as a bar to state laws.⁶⁸ None considered the actual state and congressional practice going back to 1788 and 1789. There were also decisions holding state qualification laws valid.⁶⁹

3. Commentators.

1. The first prominent writer on the Constitution expressed the view that the States had ample power to enact requirements such as property ownership and district residency. Judge St. George Tucker noted Virginia’s requirement of freehold ownership and district residency as “a wise provision and perfectly consonant with the principles of representation.” 1 ST. G. TUCKER, *BLACKSTONE’S COMMENTARIES* App. 197 (1803). He worried, however, that the law might be ineffective if the voters of a district chose to ignore those qualifications, and then the House under Article I, § 5, decided to ignore the state law and seat the winner.⁷⁰

⁶⁷ E.g., *State ex rel. Wettengel v. Zimmerman*, 249 Wis. 237, 24 N.W.2d 504 (1946). After *Clements* an Article I attack on such a law was rejected in *Joyner v. Mofford*, *supra*.

⁶⁸ E.g., *Danielson v. Fitzsimmons*, *supra*; *Stack v. Adams*, 315 F. Supp. 1295 (N.D. Fla. 1970).

⁶⁹ E.g., *Adams v. Supreme Court*, 502 F. Supp. 1282, 1291 (M.D. Pa. 1980); *Williams v. Tucker*, 382 F. Supp. 381, 388 (M.D. Pa. 1974) (three-judge court); *Oklahoma State Election Bd. v. Coats*, 610 P.2d 776, 780 (Okla. 1980); see also n. 40, *supra*.

⁷⁰ See 1 ST. G. TUCKER, *supra*, at App. 213. They “may be rendered nugatory, by the constitution which imposes no such condition, and which makes each house the judge of the qualifications, as well as of the elections and returns of its own members,” “should any man possess a sufficient interest in a district in which he neither resides nor is a freeholder, to obtain a majority of the suffrages in his favor.” 1 *id.* at App. 197, 213. The apprehension was not unfounded, even for the disqualifications of Article I, § 3. See 16 ANNALS OF CONG. 24 (1806) (Senate seating of Henry Clay

2. In the same era Thomas Jefferson reflected that, although it remained one of the "doubtful questions on which honest man may differ,"

"Had the constitution been silent, nobody can doubt but that the right to prescribe all the qualifications and disqualifications of those they would send to represent them, would have belonged to the State. So also the constitution might have prescribed the whole, and excluded all others. It seems to have preferred the middle way. It has exercised the power in part, by declaring some disqualifications, to wit, those of not being twenty-five years of age, of not having been a citizen seven years, and of not being an inhabitant of the State at the time of election. But it does not declare, itself, that the member shall not be a lunatic, a pauper, a convict of treason, of murder, of felony, or other infamous crime, or a non-resident of his district; nor does it prohibit to the State the power of declaring these, or any other disqualifications which its particular circumstances may call for; and these may be different in different States. Of course, then, by the tenth amendment, the power is reserved to the State."⁷¹

3. Justice Joseph Story in 1833 argued in his treatise, exactly contrary to Jefferson, that "the affirmation of these qualifications would seem to imply a negative of all others." 2 J. STORY, COMMENTARIES § 624 (1833). He acknowledged the state laws that required district residency or property ownership, but argued that if these were allowed "they may impose any other qualifications . . . however inconvenient, restrictive, or even mischievous," hypothesizing in particular state religious tests for office. 2 *id.* at § 623.⁷² He did not mention the override

when 29 years old). The House ignored state laws on other occasions. See *Powell v. McCormack*, *supra*, 395 U.S. at 543 n.79.

⁷¹ Letter to Joseph C. Cabell, Jan. 31, 1814, in 11 WORKS OF THOMAS JEFFERSON 380 (P. Ford ed. 1905).

⁷² Justice Story further argued that the States could not add qualifications for a Representative because he said they could not do

power of Congress in Article I, § 4, nor the specific prohibition of religious tests in Article VI. He also warned that a State might set qualifications so high that no one could meet them, thereby dissolving the Union. *Id.*⁷³

4. For years most commentators paid little attention to the issue, simply relying on Story's argument.⁷⁴ More recently, however, Professor Zechariah Chafee rejected Story's theory of exclusivity as one of two "extreme views" that did not reflect the fact that "Congress has rather cautiously imposed some additional tests by statute," and "[m]ost of the exclusions from Congress before 1919 were for offenses which had been expressly made a disqualification by Act of Congress."⁷⁵

* * *

so for the President, and "[e]ach is an officer of the Union." 2 J. STORY, *supra*, at § 626. That the people of a single State might not erect qualifications for an office representing people of all the States, however, says nothing about their setting qualifications for officers who represent their own State in Congress. Moreover, although the Constitution again is silent, States added qualifications for their Presidential electors. See pp. 37-38, *supra*.

⁷³ Although influential, Justice Story was hardly infallible, and sometimes he was famously wrong. In *Swift v. Tyson*, 16 Pet. 1 (1842), he assured "we have not now the slightest difficulty in holding" what was the "true intendment and construction" of the first Judiciary Act, 16 Pet. at 19. His conclusion prevailed for nearly a century, until *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Justice Holmes, joined by Justices Brandeis and Stone, had earlier concluded that "Mr. Justice Story probably was wrong if anyone is interested to inquire what the framers of the instrument meant," and "in my opinion the prevailing doctrine has been accepted upon a subtle fallacy that never has been analyzed." *Black & White Taxicab & Transfer Co. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532-33, 535 (1928) (dissenting opinion). See also *Mayor of New York v. Miln*, 11 Pet. 102, 158 (1837) (Story, J., dissenting, urging that grant of commerce power to Congress "leaves no residuum" for the States).

⁷⁴ Compare 1 J. KENT, COMMENTARIES ON AMERICAN LAW 214 (1826) (simply citing Article I disqualifications) with 1 *id.* 228 n.a (3d ed. 1836) (adding footnote adopting Story view).

⁷⁵ Z. CHAFEE, *supra*, at 257, 262-63 (footnote omitted). Chafee observed that "causes of exclusion must be established by law,

Whether the voters of Arkansas were wise in enacting their ballot limitation, no one at this point can say with certainty. Petitioners believe that they were; some other serious Americans believe that laws discouraging long incumbency in Congress are a bad idea. Congress may superimpose its own judgment on the matter at any time.

What is certain is that if this Court reads an unstated prohibition of this law into Article I, the opportunity for experiment will end—along with who can say how many other state regulations of congressional elections.

“Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory This Court has the power to prevent an experiment. . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.”

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). “Our view of the wisdom of a state constitutional provision may not color our task of constitutional adjudication.” *Clements v. Fashing*, *supra*, 457 U.S. at 973. And Justice Holmes cautioned against

“prevent[ing] the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.”

Truax v. Corrigan, 257 U.S. 312, 344 (1921) (dissenting opinion).

CONCLUSION

For the reasons stated, the judgment should be reversed.

and that the resolution of one house of Congress cannot make law.” *Id.* at 262 (footnote omitted). *Cf. INS v. Chadha*, *supra*; *Powell v. McCormack*, *supra*.

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APPENDICES

APPENDIX A

CONSTITUTION OF ARKANSAS

AMENDMENT NO. 73

(Adopted Nov. 3, 1992)

PREAMBLE:

The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of elected officials.

SECTION 1—Executive Branch

(a) The Executive Department of this State shall consist of a Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, all of whom shall keep their offices at the seat of government, and hold their offices for the term of four years, and until their successors are elected and qualified.

(b) No elected officials of the Executive Department of this State may serve in the same office more than two such four year terms.

SECTION 2—Legislative Branch

(a) The Arkansas House of Representatives shall consist of members to be chosen every second year by the qualified electors of the several counties. No member of the Arkansas House of Representatives may serve more than three such two years terms.

(b) The Arkansas Senate shall consist of members to be chosen every four years by the qualified electors of the several districts. No member of the Arkansas Senate may serve more than two such four year terms.

SECTION 3—Congressional Delegation

(a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas.

(b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas.

SECTION 4—Severability.

The provisions of this Amendment are severable, and if any should be held invalid, the remainder shall stand.

SECTION 5—Provisions Self-Executing

Provisions of this Amendment shall be self-executing.

SECTION 6—Application

(a) This Amendment to the Arkansas Constitution shall take effect and be in operation on January 1, 1993, and its provisions shall be applicable to all persons thereafter seeking election to the offices specified in this Amendment.

(b) All laws and constitutional provisions which conflict with this Amendment are hereby repealed to the extent that they conflict with this amendment.

APPENDIX B

CONSTITUTIONAL PROVISIONS

The Constitution of the United States provides in part:

* * * *

ARTICLE I

* * * *

SECTION 2. The House of Representatives shall be composed of Members chosen every second year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

* * * *

SECTION 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

* * * *

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

* * * *

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.

SECTION 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

* * * *

SECTION 5. Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members

* * * *

SECTION 6.

* * * *

. . . [N]o person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

* * * *

SECTION 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War,

unless actually invaded, or in such imminent Danger as will not admit of delay.

* * * *

ARTICLE II

SECTION 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice-President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

* * *

ARTICLE IV

* * * *

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

* * * *

ARTICLE VI

* * * *

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

* * * *

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * *

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

* * * *

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

* * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

* * *

AMENDMENT XVII

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures. . . .

* * *

AMENDMENT XIX

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

* * *

AMENDMENT XXII

SECTION 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. . . .

APPENDIX C

EARLY STATE LAWS—CONGRESS

Connecticut

Connecticut Resolution of October 9, 1788, provided:

Whereas the United States in Congress Assembled on the thirteenth Day of September last Resolved that the first Wednesday of March next be the Time, and the present Seat of Congress the Place for commencing Proceedings under the Constitution for the United States lately adopted, by which it has become necessary that the People of this State, elect Representatives, to attend said Congress, pursuant to the second Section of the first Article of said Constitution.

Resolved by this Assembly that to effect an Election of Representatives of the People of this State to attend the Congress of the United States on said first Wednesday of March next, the Constables of the several Towns in this State, shall warn the Freemen of their respective Towns to meet at the usual places of holding Freemens Meetings at ten oClock in the Morning of Monday the tenth Day of November next, which warning shall be given by fixing upon the public Sign Post in each Society of the several Towns a written notification signed by one or more of the Constables specifying the Time Place and Business of said Meeting at least eight Days before the Time of holding the same;

And the Freemen thus convened shall each give his Votes or Suffrages for a number not exceeding twelve Persons whom he Judges Qualified to stand in nomination for Representatives of the People of this State to the Congress of the United States; for which no Person is eligible unless he has arrived to the Age of twenty five Years has been an Inhabitant

of the United States seven Years, and at the Time of Election is an Inhabitant of this State.

* * *

. . . And the twelve Persons who have the greatest number of Votes, shall stand in the nomination for Representatives of the People in Congress; which Persons so nominated said Committee shall Certify accordingly, and shall procure a sufficient number of such Nominations with their Certificate on each to be printed and shall lodge one with the Secretary of this State for Record.

And said Committee shall forthwith transmit as many of said Printed Nominations as there are Towns in this State to the Sheriffs in the several Counties directed in Writing to an Assistant Justice of the Peace or Constable of each Town; which Nominations the Sheriffs in their respective Counties shall leave with the Persons to whom directed, or at their usual Places of Abode, before or in the thirteenth Day of Decemb [sic] next,

And the Constables of every Town shall warn a Meeting of the Freemen of such Town respectively in the same manner in every respect that is specified in this Act for warning Meetings to Vote for Nomination, to meet at ten oClock in the morning of Monday the twenty second Day of December next, when and where each Freeman shall give his Vote or Suffrage for a number not exceeding five Persons whose Names are Contained in said Nomination, to be Representatives of the People of this State in the Congress of the United States And the Assistant Justice or Constable receiving said Votes shall conduct with them in the same manner as is directed in this Act relative to the Votes for Nomination excepting that the Certificates of these Votes shall be sent by one of the Deputies to the General Assembly to be holden at the City of New Haven by Adjourn-

ment on the first Day of January next; which Assembly shall receive Sort and Count said Votes in such manner as they shall Judge proper, and declare the five Persons in said Nomination who have the greatest number of Votes to be Representatives for the People of this State to attend the Congress of the United States, for two Years pursuant to said Constitution

Connecticut Act of Jan. 1, 1789, provided:

An Act for regulating the Election of Senators and Representatives, for this State, in the Congress of the United States.

Be it enacted by the Governor, Council, and Representatives, in General Court assembled, and by the Authority of the same . . .

And be it further enacted by the Authority aforesaid, That the Freeman of the several Towns in this State, at the Freeman's Meeting in April, in the Year of our Lord 1790, and once in two Years thereafter, at the Freeman's Meeting in April, immediately after giving in their Votes for the Officers of Government, shall each give in his Vote or Suffrage for twelve Persons, such as he judges qualified, to stand in Nomination, for Election in the Month of October, then next following, as Representatives of the People of this State, in the Congress of the United States, their Names being fairly written on a Piece of Paper, to the Person who by Law presides in said Meeting; who shall in the Presence of the Freeman, make Entry of all such Persons as the Freeman shall vote for, and the Number of Votes for each; and lodge the same in the Town Clerk's Office, of the Town to which he belongs, and transmit a Copy under his Hand and Office, sealed up, to the General Assembly in May, then next following, by one of the Representatives of such Town; at which Assembly, the Votes of the Freeman shall be counted: And

the twelve Persons who have the greatest Number of Votes, shall be the Persons whose Names shall be returned to the several Towns, to stand in the Nomination aforesaid.

And the Freeman to the several Towns in this State, at the Freeman's Meeting in September, then next following, immediately after the Votes of the Freeman, for Persons to stand in Nomination as Assistants, are given in shall each of them give in his Vote, for a Number of Persons contained in said Nomination, for Representatives in Congress, not exceeding Five, to the same Person presiding, and in the same Manner; and the Person authorized to receive said Votes, shall proceed with, transmit, and deliver said Votes, to such Persons as are appointed to receive them, at the General Assembly, in October the next following, in the same Manner as by Law is prescribed, relative to the Election of Assistants in April annually; which Assembly shall count the said Votes of the Freeman, and the five Persons who shall have the greatest Number of Votes, shall be declared to be chosen Representatives of the People of this State, in the Congress of the United States.

And no Person shall be Representative as aforesaid, who shall not have arrived to the Age of Twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of this State. . . .

Delaware

Delaware Act of Oct. 28, 1788, provided:

In the Thirteenth Year of the Independence of the Delaware State, An Act directing the time, Places, and Manner of holding an Election for a Representative of this State in the Congress of the United States, and for appointing Electors, on the part of this State,

for Choosing a President and Vice President of the United States,

* * *

AND BE IT ENACTED, that every person coming to vote for a Representative and Electors, agreeably to the said constitution and the Directions of this Act, shall deliver in writing on one ticket or piece of paper, the names of two persons, one of whom at least shall not be an inhabitant of the same county with themselves, to be voted for as Representative, and one other person to be voted for as one of the Electors, for the purposes in the said Constitution mentioned which said Elector shall be an inhabitant of the same county in which he shall be voted for. . . .

. . . [A]nd the said President or Commander in chief shall thereupon declare, by proclamation the name of the person highest in vote, and therefore duly elected as Representative of and for this State in the Congress of the United States, and also the names of the three Persons who shall be highest in vote among those voted for as Electors, and therefore duly elected Electors agreeably to the constitution aforesaid; . . .

Massachusetts

Massachusetts Resolve of Nov. 19, 1788, ch. 49, provided:

Resolve for organizing the Federal Government.
November 19, 1788.

Resolved, That the Commonwealth be divided into eight districts, for the purpose of choosing eight persons to represent the people thereof, in the Congress of the United States, each district to choose one Representative, who shall be an inhabitant of such district, and that the districts be as follows, viz. . . .

Virginia

Virginia Act of Nov. 20, 1788, ch. II, provided:

*An ACT for the Election of REPRESENTATIVES
pursuant to the Constitution of Government
of the United States.*

[Passed the 20th of NOVEMBER, 1788.]

SECTION I. . . . WHEREAS, it is provided by the said Constitution, that until the enumeration therein directed shall be taken, *Virginia* shall be entitled to ten Members in the House of Representatives, and that the times, places, and manner of holding elections for the same, shall be prescribed by the Legislature: *BE it therefore enacted by the General Assembly*, . . .

SECT II. THAT the persons qualified by law to vote for members to the House of Delegates, in each county composing a district, shall assemble at their respective county court-houses on the second day in *February* next, and then and there vote for some discreet and proper person, being a freeholder, and who shall have been a *bona fide* resident for twelve months within such district, as a member to the House of Representatives for the United States. . . .

Virginia Act of December 26, 1792, ch. 1, provided:

An ACT for arranging the Counties of this Commonwealth into Districts to choose Representatives to Congress. . . .

SEC. II. *AND be it further enacted*, That the persons qualified by law to vote for members to the House of Delegates in each county and corporation composing a district, shall assemble at their respective county court-houses, on the third Monday in March next, and also on the third Monday in March in every second year thereafter, and then and there vote for some discreet and proper person, being a freeholder and resident within such district, as a member of the House of Representatives for the United States.

New Jersey

New Jersey Act of November 21, 1788, ch. 241, provided:

An ACT for carrying into Effect, on the Part of the State of New Jersey, the Constitution of the United States, assented to, ratified and confirmed by this State, on the eighteenth Day of December, in the Year of our LORD One Thousand Seven Hundred and Eighty-seven.

WHEREAS, the good People of this State, on the said eighteenth Day of December, in and by a Convention of Delegates chosen by the Citizens thereof, agreeably to an Act of the Legislature for that Purpose made and provided, did, on the Part of this State assent to, ratify and confirm, a Constitution for the United States, agreed to and recommended, in the Name of the People of the United States, by the unanimous Consent of the said United States in Convention assembled at Philadelphia on the seventeenth Day of September, in the said Year of our LORD One Thousand Seven Hundred and Eighty-seven: AND WHEREAS, in and by the said Constitution, it is, among other Things, provided and directed, . . .

That the Times, Places and Manner, of holding Elections for Senator, and Representatives shall be prescribed in each State by the Legislature thereof . . .

Sect. I. BE IT ENACTED by the Council and General Assembly of this State, and it is hereby Enacted by the Authority of the same, That it shall and may be lawful for every Inhabitant of this State, who is or shall be qualified to vote for Members of the State Legislature, to nominate four Candidates to the Choice of the People, as Representatives in the said Congress of the United States, by writing on one Ticket or Piece of Paper the Names of four Persons to be voted for as Representatives, which said Ticket or Piece of Paper shall be subscribed by the Person nominating with the Date of doing the same, and that at any Time at least thirty Days previous to the Day

of Election of said Representatives, delivering the said Ticket or Piece of Paper so subscribed and dated to the Clerk of the Court of Common Pleas of the County in which such Inhabitant may reside, which Clerk is hereby directed and required to receive and carefully to file the same, provided it be delivered within the Time aforesaid.

2. *And be it Enacted by the Authority aforesaid, That each and every Clerk of the Court of Common Pleas in the respective Counties of this State is, and hereby are directed and required, at the Expence of the State, twenty-four Days previous to the Day of Election of the said Representatives, to transmit, by a careful and trusty Person, a true Copy of all and every such Nomination as shall be delivered to him as aforesaid to the Governor of this State for the Time being, who is hereby directed and required, at least eighteen Days previous to the said Day of Election for Representatives, to cause the same to be published in the News-Papers printed in this State, and in two or more printed in the cities of New-York and Philadelphia; and also to transmit a true List of the Names of every Candidate so returned to him as aforesaid to each and every Sheriff of the respective Counties in this State, who is hereby required immediately to put up, in at least five of the most publick Places in his County, a true List of the Names of the said Candidates.*

3. *And be it further Enacted by the Authority aforesaid, That the Persons so nominated, and whose Names shall be transmitted to the several Sheriffs as aforesaid, shall exclusively be the Candidates from whom four Representatives shall be voted for in each of the Counties of this State; and that no Person whatever shall be set up as a Candidate on the said Day of Election, but the Persons so nominated and returned as aforesaid. . . .*

Maryland

Maryland Act of Dec. 22, 1788, ch. 10, provided:

An ACT directing the time, places and manner, of holding elections for representatives of this state in the congress of the United States, and for appointing electors on the part of this state for choosing a president and vice-president of the United States, and for the regulation of the said elections. . . .

II. BE IT ENACTED, *by the General Assembly of Maryland*, That for the purpose of choosing representatives in the congress of the United States, this state be divided into six districts, which shall be numbered from one to six; that Saint-Mary's, Charles, and Calvert counties, compose the first district; Kent, Talbot, Cecil and Queen-Anne's, the second; Anne-Arundel, including the city of Annapolis, and Prince-George's, the third; Baltimore, including the town of Baltimore, and Harford, the fourth; Somerset, Dorchester, Worcester and Caroline, the fifth; and Frederick, Washington and Montgomery, the sixth district. . . .

VII. AND BE IT ENACTED, That every person coming to vote for representatives for this state in the congress of the United States, shall have a right to vote for six persons, one whereof shall be a resident of each of the said districts, and the candidate in each district having the greatest number of votes of all the candidates residing in that district, shall be declared to be duly elected for that district. . . .

XIII. AND BE IT ENACTED, That if a vacancy or vacancies shall happen in the representation of this state in the house of representatives in the congress of the United States, by death, resignation, disqualification, or otherwise, the governor and council shall issue writs of election to the several counties in this state, the city of Annapolis and Baltimore-town, to fill such vacancy or vacancies by an election of a representative or representatives residing in the district or districts where such vacancy or vacancies shall happen, in the manner herein before prescribed. . . .

Georgia

Georgia Act of Jan. 23, 1789, p. 247, provided:

An Act For appointing the times, manner and places for holding elections for representatives in Congress.

In order on the part of this State to carry into effect the Constitution of the United States of America. Be it enacted by the freemen of the State of Georgia in general Assembly met and it is hereby enacted by the authority of the same that the elections in this State for members of the House of Representatives in Congress of the United States shall be held in the manner following, that is to say, this State shall be and is hereby declared to be divided into three districts [T]he manner of electing three members for Representatives of the State shall be, that every man shall ballot three persons, one subj. of which shall be a resident of three years standing in the district such constituent resides in; and the other two persons to be ballotted for by such voter shall be residents of like standing of the other two separate districts: that is to say, there shall be one candidate balloted for by every voter who is an inhabitant of each separate district so that each district in the State may be properly, impartially and effectually represented. . . .

North Carolina

North Carolina Act of Dec. 16, 1789, ch. 1, provided:

An Act directing the Manner of electing Representatives to represent this State in Congress.

I. BE it enacted by the General Assembly of the State of North-Carolina, and it is hereby enacted by the authority of the same, That until an actual census be made, this state shall be divided and laid off into five divisions: . . . each of which divisions shall be entitled to elect and send one Representative to the Legislature of the United States; and the person elected in each division shall be a

resident or inhabitant of the division for which he is elected, during the space or term of one year before, and at the time of election. . . .

Tennessee

Tennessee Act of Aug. 3, 1796, ch. 1, provided:

An ACT directing the mode of electing one representative to represent this State in the Congress of the United States. . . .

Sec. 2. *Be it enacted*, That the person elected shall have been a citizen or resident of this state, three years next immediately preceding the day of election: *Provided*, That this shall not be construed to extend to any person who was a citizen or resident of this state at the time of making the constitution thereof.

APPENDIX D

EARLY STATE LAWS—PRESIDENTIAL ELECTORS

Pennsylvania

Pennsylvania Act of Oct. 4, 1788, provided:

An Act directing the time, places and manner of holding elections for Representatives of this State in the Congress of the United States and for appointing Electors on the part of this State for chusing a President and Vice-President of the United States.

* * *

And be it further enacted by the authority aforesaid That every person coming to elect Representatives shall deliver in writing on one ticket or piece of paper the names of Eight persons to be voted for as Representatives, And that every person coming to vote for Electors agreeably to the said Constitution and the directions of this Act shall deliver in writing on one ticket or piece of paper the names of ten persons to be voted for as Electors agreeably to the said Constitution and for the purposes therein mentioned the said Persons so voted for as Representatives and Electors to be selected from the Citizens and Inhabitants of the state at large who are duly qualified according to the said Constitution to serve in the said respective Stations which said tickets or Ballots shall be received and dealt with in like manner with those delivered in at the General Elections for Members of Assembly and Councillors of this State. . . .

And the said Supreme Executive Council after having received the returns papers and instruments aforesaid from the said City and each and every of the counties aforesaid shall enumerate and ascertain the numbers of Votes for each and every Candidate and person so as aforesaid chosen as representatives

or Electors respectively and shall thereupon declare by proclamation issued by the said Council duly signed by the President, and without delay dispersed thro' the State, the names of the Eight persons highest in Votes of the Electors throughout the State, and in consequence duly elected and chosen as Representatives of and for the State in the Congress of the United States, and the names of the ten persons highest in Votes and therefore elected as Electors agreeably to the Constitution aforesaid. . . .

Delaware

Delaware Act of Oct. 28, 1788, provided:

In the Thirteenth Year of the Independence of the Delaware State, An Act directing the time, Places, and Manner of holding an Election for a Representative of this State in the Congress of the United States, and for appointing Electors, on the part of this State, for Choosing a President and Vice President of the United States,

And be it enacted, that every person coming to vote for a Representative and Electors, agreeably to the said constitution and the Directions of this Act, shall deliver in writing on one ticket or piece of paper, the names of two persons, one of whom at least shall not be an Inhabitant of the same County with themselves, to be voted for a Representative, and one other person to be voted for as one of the Electors, for the purposes in the said Constitution mentioned which said Elector shall be an Inhabitant of the same County in which he shall be voted for. . . .

. . . [A]nd the said President or Commander in chief shall thereupon declare by Proclamation the name of the Person highest in vote, and therefore duly elected as Representative of and for the State in the Congress of the United States, and also the names of the three Persons who shall be highest in vote among

those voted for as Electors, and therefore duly elected Electors agreeably to the Constitution aforesaid. . . .

New Hampshire

New Hampshire Act of Nov. 12, 1788, provided:

An Act for carrying into effect an Ordinance of Congress of the 13th Sept. last—relative to the Constitution of the United States

Be it enacted by the Senate and House of Representatives in General Court convened

And be it further enacted by the Authority aforesaid that the Inhabitants of the several towns & parishes plantations And places unincorporated qualified as aforesaid shall on the third monday of December next in town meeting assembled give in their votes for five persons Inhabitants of this State who shall not be Continental Senators Representatives or persons holding offices of profit or trust under the united States to be the electors for this State

Virginia

Virginia Act of Nov. 17, 1788, provided:

An ACT for the appointment of Electors to chuse a President pursuant to the Constitution of Government of the United States.

Passed the 17th of November 1788.

Whereas the United States in Congress assembled did on the thirteenth day of September in the year of our Lord one thousand seven hundred and eighty eight resolve that the first Wednesday in January next be the day for appointing Electors in the several States which before the said day shall have ratified the New Constitution of Government for the United States that the first Wednesday in February next be the day for the Electors to assemble in their respec-

tive States and vote for a President and that the first Wednesday in March next be the time and the present Seat of Congress the place for commencing proceedings under the said Constitution Be it therefore enacted by the General Assembly that for the purpose of chusing twelve Electors on behalf of this State to vote for a President in conformity to the Constitution of Government for the United States the several Counties in this Commonwealth shall be allotted into twelve Districts in manner following That the persons qualified by law to vote for Members to the General Assembly in each County composing a District shall assemble at their respective Courthouses on the first Wednesday in January and then and there vote for some discreet and proper person being a freeholder and bona fide resident in such District for twelve months as an Elector for such District to vote for a President of the United States in conformity to the said Constitution

Massachusetts

Massachusetts Resolve of Nov. 19, 1788, provided:

Resolved for organizing the Federal Government
November 19, 1788

Resolved,

And be it further Resolved,

That when the inhabitants of the several Towns & Districts qualified as aforesaid shall be assembled on the said eighteenth day of December next, they shall also give in their votes for two persons who shall be inhabitants of the district in which such Town or District may be, as Candidates for an Elector of the President and Vice President of the United States—And a list of the votes so given in as aforesaid, Shall, by the Selectmen of the several Towns & Districts, or the major part of them be transmitted to the Secretary's office on or before the first monday

in January next—and on the Wednesday next following, the General Court then in session shall examine the said Returns, and from the two who shall be found to have the greatest number of votes in each district, the members of the two houses assembled in one room shall be joint ballot elect one who shall be the Elector for the district to which he belongs—and in case it should so happen, that more than two persons voted for as Electors should have an equality of votes among the highest voted for, then the members of the two houses as aforesaid shall out of such number choose the Elector

And be it further Resolved

That the members of the two houses of the General Court shall in manner as aforesaid appoint at large, two Electors for the President and Vice President, not voted for by the districts as aforesaid—
. . . .

New Jersey

New Jersey Act of Nov. 21, 1788, provided:

An ACT for carrying into Effect, on the Part of the State of New Jersey, the Constitution of the United States, assented to, ratified and confirmed by this State, on the eighteenth Day of December, in the Year of our LORD One Thousand Seven Hundred and Eighty-seven. . . .

8. *And be it further Enacted by the Authority aforesaid*, That, until further Provision shall be made by Law for the nominating and appointing the Electors to be chosen by this State for the Purpose of voting for two Persons as is mentioned in the first Section of the second Article of said Constitution, it shall and may be lawful for the Governor and Council of this State to meet on the first Wednesday in January next at Princeton, unless the Legislature of the State shall be sitting elsewhere, and then at such

Place, and then and there, by Plurality of Votes, to nominate, elect and appoint, six Citizens of this State, being Freeholders and Residents in the State, and otherwise qualified to be the Electors for the Purposes mentioned in the said Constitution, whom the Governor for the Time being shall commission under the Great Seal of the State, and make known the same by Proclamation;

Maryland

Maryland Act of Dec. 22, 1788, provided:

An ACT directing the time, place and manner, of holding elections for representatives of this state in the congress of the United States, and for appointing electors on the part of this state for choosing a president and vice-president of the United States, and for the regulation of the said elections. . . .

VI. *And be it enacted.* That every person coming to vote for electors of president and vice-president, agreeably to the directions of this act, shall have a right to vote for eight persons, five of whom shall be residents of the western shore, and three of the eastern shore, and the five persons residents of the western shore, having the greater number of votes of all the candidates on that shore, and the three persons residents of the eastern shore, having the greatest number of votes of all the candidates on that shore, shall be declared to be duly elected. . . .

APPENDIX E

FEDERAL DISQUALIFICATION LAWS

1. Current Disqualification Laws

(Emphasis in all instances supplied)

1. Title 18 U.S.C. § 201 provides:

Bribery of public officials and witnesses

. . . .

(b) Whoever— . . .

(4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom;

shall be fined not more than three times the monetary equivalent of the thing of value, or imprisoned for not more than fifteen years, or both, and *may be disqualified from holding any office of honor, trust, or profit under the United States.* . . .

2. Title 18 U.S.C. § 592 provides:

Troops at polls

Whoever, being an officer of the Army or Navy, or other person in the civil, military, or naval service of the United States orders, brings, keeps, or has under his authority or control any troops or armed men at any place where a general or special election is held, unless such force be necessary to repel armed enemies of the United States, *shall* be fined not more than \$5,000 or imprisoned not more than five years, or both; and *be disqualified from holding any office of honor, profit, or trust under the United States* . . .

3. Title 18 U.S.C. § 593 provides:

Interference by armed forces

Whoever, being an officer or member of the Armed Forces of the United States, prescribes or fixes or attempts to prescribe or fix, whether by proclamation, order or otherwise, the qualifications of voters at any election in any State; or

Whoever, being such officer or member, prevents or attempts to prevent by force, threat, intimidation, advice or otherwise any qualified voter of any State from fully exercising the right of suffrage at any general or special election; or

Whoever, being such officer or member, orders or compels or attempts to compel any election officer in any State to receive a vote from a person not legally qualified to vote; or

Whoever, being such officer or member, imposes or attempts to impose any regulations for conducting any general or special election in a State, different from those prescribed by law; or

Whoever, being such officer or member, interferes in any manner with an election officer's discharge of his duties—

Shall be fined not more than \$5,000 or imprisoned not more than five years, or both; and disqualified from holding any office of honor, profit or trust under the United States. . . .

4. Title 18 U.S.C. § 1901 provides:

Collecting or disbursing officer trading in public property

Whoever, being an officer of the United States concerned in the collection or the disbursement of the revenues thereof, carries on any trade or business in the funds or debts of the United States, or of any

State, or in any public property of either, shall be fined not more than \$3,000 or imprisoned not more than one year, or both; and *shall be removed from office, and be incapable of holding any office under the United States.*

5. Title 18 U.S.C. § 2071 provides:

Concealment, removal, or mutilation generally

... (b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined not more than \$2,000 or imprisoned not more than three years, or both; and *shall forfeit his office and be disqualified from holding any office under the United States.* As used in this subsection, the term "office" does not include the office held by any person as a retired officer of the Armed Forces of the United States.

6. Title 18 U.S.C. § 2381 provides:

Treason

Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States, or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined not less than \$10,000; *and shall be incapable of holding any office under the United States.*

7. Title 18 U.S.C. § 2383 provides:

Rebellion or insurrection

Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both; and *shall be incapable of holding any office under the United States.*

8. Title 5 U.S.C. § 7311 provides:

Loyalty and striking

An individual *may not accept or hold a position in the Government of the United States* or the government of the District of Columbia if he—

(1) advocates the overthrow of ~~our~~ constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia.

9. Title 5 U.S.C. § 7313 provides:

Riots and civil disorders

(a) An individual convicted by any Federal, State, or local court of competent jurisdiction of—

(1) inciting a riot or civil disorder;

(2) organizing, promoting, encouraging, or participating in a riot or civil disorder;

(3) aiding or abetting any person in committing any offense specified in clause (1) or (2); or

(4) any offense determined by the head of the employing agency to have been committed in

furtherance of, or while participating in, a riot or civil disorder;

shall, if the offense for which he is convicted is a felony, be ineligible to accept or hold any position in the Government of the United States or in the government of the District of Columbia for the five years immediately following the date upon which his conviction becomes final. Any such individual holding a position in the Government of the United States or the government of the District of Columbia on the date his conviction becomes final shall be removed from such position.

(b) For the purposes of this section, "felony" means any offense for which imprisonment is authorized for a term exceeding one year.

10. Title 46 U.S.C. § 59 provides:

Penalty for neglect by officers

If any person authorized and required by this chapter to perform, as an officer, any act or thing, willfully neglects to do or perform the same according to the true intent and meaning of this chapter, he shall, if not subject to the penalty and disqualification prescribed in section 58 of this title, be punishable by a fine of \$500 for the first offense, and by a like fine for the second offense, and *shall thenceforth be rendered incapable of holding any office of trust or profit under the United States.*

11. Title 46 U.S.C. § 322 provides:

Penalty for malfeasance

Every person, authorized and required by sections 251-255, 258, 259, 262-280, 293, 306-316, 318, 321-330, and 333-335 of this title to perform any act or thing as an officer, who willfully neglects or refuses to do and perform the same, according to the true intent and meaning of such sections, shall, if not

subject to the penalty and disqualifications prescribed in section 321 of this title, be liable to a penalty of \$500 for the first offense, and of like sum for the second offense, and *shall*, after conviction for the second offense, *be rendered incapable of holding any office of trust or profit under the United States.*

2. Former Disqualification Laws

(Emphasis on substantive provisions supplied)

1. Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 66, 67:

SEC. 8. *And be it further enacted*, That no person appointed to any office instituted by this act, shall directly or indirectly be concerned or interested in carrying on the business of trade or commerce, or be owner in whole or in part of any sea-vessel, or purchase by himself, or another in trust for him, any public lands or other public property, or be concerned in the purchase or disposal of any public securities of any State, or of the United States, or take or apply to his own use, any emolument or gain for negotiating or transacting any business in the said department, other than what shall be allowed by law; and if any person shall offend against any of the prohibitions of this act, he shall be deemed guilty of a high misdemeanor, and forfeit to the United States the penalty of three thousand dollars, and *shall upon conviction* be removed from office, and *forever thereafter incapable of holding any office under the United States: Provided*, That if any other person than a public prosecutor shall give information of any such offence, upon which a prosecution and conviction shall be had, one half of the aforesaid penalty of three thousand dollars, when recovered, shall be for the use of the person giving such information.

2. Act of April 30, 1790, ch. 9, § 21, 1 Stat. 112, 117:

SEC. 21. *And be it [further] enacted*, That if any person shall, directly or indirectly, give any sum or

sums of money, or any other bribe, present or reward, or any promise, contract, obligation or security, for the payment or delivery of any money, present or reward, or any other thing to obtain or procure the opinion, judgment or decree of any judge or judges of the United States, in any suit, controversy, matter or cause depending before him or them, and shall be thereof convicted, such person or persons so giving, promising, contracting or securing to be given, paid or delivered, any sum or sums of money, present, reward or other bribe as aforesaid, and the judge or judges who shall in any wise accept or receive the same, on conviction thereof shall be fined and imprisoned at the discretion of the court; and *shall forever be disqualified to hold any office of honour, trust or profit under the United States.*

3. Act of May 8, 1792, ch. 37, § 12, 1 Stat. 280, 281:

SEC. 12. *And be it further enacted*, That the restriction on the clerks of the department of the treasury so far as respects the carrying on of any trade or business, other than in the funds or debts of the United States or of any state, or in any kind of public property, be abolished, and that such restriction, so far as respects the funds or debts of the United States, or of any state, or any public property of either, be extended to the commissioner of the revenue, to the several commissioners of loans, and to all persons employed in their respective offices, and to all officers of the United States concerned in the collection or disbursement of the revenues thereof, under the penalties prescribed in the eighth section of the act, intitled "An act to establish the treasury department" [Act of Sept. 2, 1789] and the provisions relative to the officers in the treasury department, contained in the "Act to establish the post-office and post roads," shall be and hereby are extended and applied to the commissioner of the revenue.

4. Act of Dec. 31, 1792, ch. 1, § 26, 1 Stat. 287, 298:

SEC. 26. *And be it further enacted*, That every collector, or officer, who shall knowingly make, or be concerned in making, any false register or record, or shall knowingly grant, or be concerned in granting, any false certificate of registry or record of, or for any ship or vessel, or other false document whatsoever, touching the same, contrary to the true intent and meaning of this act, or who shall designedly take any other, or greater fees, than are by this act allowed, or who shall receive any voluntary reward or gratuity, for any of the services performed, pursuant thereto; and every surveyor, or other person appointed to measure any ship or vessel, who shall wilfully deliver to any collector, or naval officer, a false description of such ship or vessel, to be registered or recorded, *shall*, upon conviction of any such neglect, or offence, forfeit the sum of one thousand dollars, and *be rendered incapable of serving in any office of trust or profit, under the United States*; and if any person or persons, authorized and required by this act, in respect to his or their office or offices, to perform any act or thing, required to be done or performed, pursuant to any of the provisions of this act, shall wilfully neglect to do or perform the same, according to the true intent and meaning of this act, such person or persons shall, on being duly convicted thereof, if not subject to the penalty and disqualification aforesaid, forfeit the sum of five hundred dollars for the first offence, and a like sum for the second offence, and *shall, thenceforth, be rendered incapable of holding any office of trust or profit under the United States*.

5. Act of Feb. 18, 1793, ch. 8, § 29, 1 Stat. 305, 315:

SEC. 29. *And be it further enacted*, That every collector, who shall knowingly make any record of enrolment or license of any ship or vessel, and every other officer, or person, appointed by, or under them,

who shall make any record, or grant any certificate, or other document whatever, contrary to the true intent and meaning of this act, or shall take any other, or greater fees, than are by this act allowed, or shall receive, for any service performed pursuant to this act, any reward or gratuity, and every surveyor, or other person appointed to measure ships or vessels, who shall wilfully deliver to any collector, or naval officer, a false description of any ship or vessel, to be enrolled or licensed, in pursuance of this act, *shall*, upon conviction of any such neglect or offence, forfeit to the United States five hundred dollars, and *be rendered incapable of serving in any office of trust or profit, under the United States*. And if any person, authorized and required by this act, in respect to his office, to perform any act or thing required by this act, shall wilfully neglect or refuse to do and perform the same, according to the true intent and meaning of this act, such person, on being duly convicted thereof, if not hereby subject to the penalty and disqualifications aforesaid, shall forfeit and pay the sum of five hundred dollars for the first offence, and a like sum for the second offence, and *shall from thenceforward, be rendered incapable of holding any office of trust or profit under the United States*.

6. Act of Feb. 26, 1853, ch. 81, § 5, 10 Stat. 170, 171:

SEC. 5. *And be it further enacted*, That any officer having the custody of any record, document, paper, or proceeding specified in the last preceding section of this act, who shall fraudulently take away, or withdraw, or destroy any such record, document, paper, or proceeding filed in his office or deposited with him, or in his custody, shall be deemed guilty of felony, and on conviction in any court of the United States having jurisdiction thereof, shall pay a fine not exceeding two thousand dollars, or suffer imprisonment in a penitentiary not exceeding three years, or both, as the court in its discretion shall adjudge,

and shall forfeit his office and *be forever afterwards disqualified from holding any office under the Government of the United States.*

7. Act of Feb. 26, 1853, ch. 81, § 6, 10 Stat. 170, 171:

SEC. 6. *And be it further enacted*, That if any person or persons shall, directly or indirectly, promise, offer, or give, or cause or procure to be promised, offered, or given, any money, goods, right in action, bribe, present, or reward, or any promise, contract, undertaking, obligation, or security for the payment or delivery of any money, goods, right in action, bribe, present, or reward, or any other valuable thing whatever, to any member of the Senate or House of Representatives of the United States, after his election as such member, and either before or after he shall have qualified and taken his seat, or to any officer of the United States, or person holding any place of trust or profit, or discharging any official function under, or in connection with, any department of the Government of the United States, or under the Senate or House of Representatives of the United States, after the passage of this act, with intent to influence his vote or decision on any question, matter, cause, or proceeding which may then be pending, or may by law, or under the Constitution of the United States, be brought before him in his official capacity, or in his place of trust or profit, and shall be thereof convicted, such person or persons so offering, promising, or giving, or causing or procuring to be promised, offered, or given any such money, goods, right in action, bribe, present, or reward, or any promise, contract, undertaking, obligation, or security for the payment or delivery of any money, goods, right in action, bribe, present, or reward, or other valuable thing whatever, and the member, officer, or person who shall in anywise accept or receive the same, or any part thereof, shall be liable

to indictment as for a high crime and misdemeanor in any court of the United States having jurisdiction for the trial of crimes and misdemeanors; and shall, upon conviction thereof, be fined not exceeding three times the amount so offered, promised, or given, and imprisoned in a penitentiary not exceeding three years; and the person convicted of so accepting or receiving the same, or any part thereof, if an officer or person holding any such place of trust or profit as aforesaid, shall forfeit his office or place; and any person so convicted under this section *shall forever be disqualified to hold any office of honor, trust, or profit, under the United States.*

8. Act of July 2, 1862, ch. 128, 12 Stat. 502:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter every person elected or appointed to any office of honor or profit under the government of the United States, either in the civil, military or naval departments of the public service, excepting the President of the United States, shall, before entering upon the duties of such office, and before being entitled to any of the salary or other emoluments thereof, *take and subscribe the following oath or affirmation*: "I, A. B., do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto. And I do further swear (or affirm) that, to the best of my knowledge and ability, I will sup-

port and defend the Constitution of the United States, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God;" which said oath, so taken and signed, shall be preserved among the files of the court, House of Congress, or Department to which the said office may appertain. And *any person who shall falsely take the said oath shall be guilty of perjury, and on conviction, in addition to the penalties now prescribed for that offense, shall be deprived of his office and rendered incapable forever after of holding any office or place under the United States.*

9. Act of July 16, 1862, ch. 180, 12 Stat. 577, 578:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any member of Congress or any officer of the government of the United States who shall, directly or indirectly, take, receive, or agree to receive, any money, property, or other valuable consideration whatsoever, from any person or persons for procuring, or aiding to procure, any contract, office, or place, from the government of the United States or any department thereof, or from any officer of the United States, for any person or persons whatsoever, or for giving any such contract, office, or place to any person whomsoever, and the person or persons who shall directly or indirectly offer or agree to give, or give or bestow any money, property, or other valuable consideration whatsoever, for the procuring or aiding to procure any contract, office, or place as aforesaid, and any member of Congress who shall directly or indirectly take, receive, or agree to receive any money, property, or other valuable consideration whatsoever after his election as such member, for his attention to, serv-

ices, action, vote, or decision on any question, matter, cause or proceeding which may then be pending, or may by law or under the Constitution of the United States be brought before him in his official capacity, or in his place of trust and profit as such member of Congress, shall, for every such offense, be liable to indictment as for a misdemeanor in any court of the United States having jurisdiction thereof, and on conviction thereof shall pay a fine of not exceeding ten thousand dollars, and suffer imprisonment in the penitentiary not exceeding two years, at the discretion of the court trying the same; and any such contract or agreement, as aforesaid, may, at the option of the President of the United States, be absolutely null and void; and *any member of Congress or officer of the United States convicted, as aforesaid, shall, moreover, be disqualified from holding any office of honor, profit, or trust under the government of the United States.*

10. Act of July 17, 1862, ch. 195, §§ 1-3, 12 Stat. 589, 590:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every person who shall hereafter commit the crime of treason against the United States, and shall be adjudged guilty thereof, shall suffer death, and all his slaves, if any, shall be declared and made free; or, at the discretion of the court, he shall be imprisoned for not less than five years and fined not less than ten thousand dollars, and all his slaves, if any, shall be declared and made free; said fine shall be levied and collected on any or all of the property, real and personal, excluding slaves, of which the said person so convicted was the owner at the time of committing the said crime, any sale or conveyance to the contrary notwithstanding.

SEC. 2. *And be it further enacted,* That if any person shall hereafter incite, set on foot, assist, or

engage in any rebellion or insurrection against the authority of the United States, or the laws thereof, or shall give aid or comfort thereto, or shall engage in, or give aid and comfort to, any such existing rebellion or insurrection, and be convicted thereof, such person shall be punished by imprisonment for a period not exceeding ten years, or by a fine not exceeding ten thousand dollars, and by the liberation of all his slaves, if any he have; or by both of said punishments, at the discretion of the court.

SEC. 3. *And be it further enacted, That every person guilty of either of the offenses described in this act shall be forever incapable and disqualified to hold any office under the United States.*

11. Act of June 11, 1864, ch. 119, 13 Stat. 123:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no member of the Senate or House of Representatives shall, after his election and during his continuance in office, nor shall any head of a department, head of a bureau, clerk, or any other officer of the government receive or agree to receive any compensation whatsoever, directly or indirectly, for any services rendered, or to be rendered, after the passage of this act, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever. And any person offending against any provision of this act shall, on conviction thereof, be deemed guilty of a misdemeanor, and be punished by a fine not exceeding ten thousand dollars, and by imprisonment for a term not exceeding two years, at the discretion of the court trying the same, and shall be forever thereafter incapable of holding any office of honor,

trust, or profit under the government of the United States.

12. Act of Feb. 25, 1865, ch. 52, §§ 1, 2, 13 Stat. 437:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for any military or naval officer of the United States, or other person engaged in the civil, military, or naval service of the United States, to order, bring, keep, or have under his authority or control, any troops or armed men at the place where any general or special election is held in any state of the United States of America, unless it shall be necessary to repel the armed enemies of the United States, or to keep the peace at the polls. And that it shall not be lawful for any officer of the army or navy of the United States to prescribe or fix, or attempt to prescribe or fix, by proclamation, order, or otherwise, the qualifications of voters in any state of the United States of America, or in any manner to interfere with the freedom of any election in any state, or with the exercise of the free right of suffrage in any state of the United States. Any officer of the army or navy of the United States, or other person engaged in the civil, military, or naval service of the United States, who violates this section of this act, shall, for every such offence, be liable to indictment as for a misdemeanor, in any court of the United States having jurisdiction to hear, try, and determine cases of misdemeanor, and on conviction thereof shall pay a fine not exceeding five thousand dollars, and suffer imprisonment in the penitentiary not less than three months, nor more than five years, at the discretion of the court trying the same; and any person convicted as aforesaid shall, moreover, be disqualified from holding any office of honor, profit, or trust, under the government of the United States: Pro-

vided, That nothing herein contained shall be so construed as to prevent any officers, soldiers, sailors, or marines, from exercising the right of suffrage in any election district to which he may belong, if otherwise qualified according to the laws of the state in which he shall offer to vote.

SEC. 2. *And be it further enacted*, That any officer or person in the military or naval service of the United States, who shall order or advise, or who shall directly or indirectly, by force, threat, menace, intimidation, or otherwise, prevent or attempt to prevent any qualified voter of any state of the United States of America from freely exercising the right of suffrage at any general or special election in any state of the United States, or who shall in like manner compel, or attempt to compel, any officer of an election in any such state to receive a vote from a person not legally qualified to vote, or who shall impose or attempt to impose any rules or regulations for conducting such election different from those prescribed by law, or interfere in any manner with any officer of said election in the discharge of his duties, shall for any such offence be liable to indictment as for a misdemeanor, in any court of the United States having jurisdiction to hear, try, and determine cases of misdemeanor, and on conviction thereof shall pay a fine of not exceeding five thousand dollars, and suffer imprisonment in the penitentiary not exceeding five years, at the discretion of the court trying the same, and any person convicted as aforesaid, *shall, moreover, be disqualified from holding any office of honor, profit, or trust, under the government of the United States.*

13. Act of March 3, 1911, ch. 231, § 144, 36 Stat. 1087, 1136:

SEC. 144. Whoever, *being elected or appointed a Senator, Member of, or Delegate to Congress*, or a Resident Commissioner, shall, after his election or

appointment, and either before or after he has qualified, and during his continuance in office, practice in the Court of Claims, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and *shall, moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States.*

14. Title 18 U.S.C. § 203 (1988 ed.):

Compensation to Members of Congress, officers and others in matters affecting the Government

(a) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly—(1) demands, seeks, receives, accepts, or agrees to receive, or accept, any compensation for any services rendered or to be rendered either personally or by another—

(A) at a time when such person is a Member of Congress, Member of Congress Elect, Delegate, Delegate Elect, Resident Commissioner, or Resident Commissioner Elect; or

(B) at a time when such person is an officer or employee of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States, including the District of Columbia.

in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court-martial, officer, or any civil, military, or naval commission; or

(2) knowingly directly or indirectly gives, promises, or offers any compensation for any such services rendered or to be rendered at a time when the

person to whom the compensation is given, promised, or offered, is or was such a Member, Delegate, Commissioner, officer, or employee;

Shall be fined under this title or imprisoned for not more than two years, or both; and *shall be incapable of holding any office of honor, trust, or profit under the United States. . . .*

15. Title 18 U.S.C. § 204 (1988 ed.):

Practice in United States Claims Court or the
United States Court of Appeals for the
Federal Circuit by Members of Congress

Whoever, being a Member of Congress, Member of Congress Elect, Delegate from the District of Columbia, Delegate Elect from the District of Columbia, Resident Commissioner, or Resident Commissioner Elect, practices in the United States Claims Court or the United States Court of Appeals for the Federal Circuit, shall be fined not more than \$10,000 or imprisoned for not more than two years, or both, and *shall be incapable of holding any office of honor, trust, or profit under the United States.*

APPENDIX F

OTHER ARKANSAS ELECTION PROVISIONS

Constitution

1. Arkansas Constitution, Art. 3, § 1, provides:

Qualifications of electors—Equal suffrage—Poll tax.

Every citizen of the United States of the age of twenty-one years, who has resided in the State twelve months, in the county six months, and in the precinct, town or ward one month, next preceding any election at which they may propose to vote, except such persons as may for the commission of some felony be deprived of the right to vote by law passed by the General Assembly, and who shall exhibit a poll tax receipt or other evidence that they have paid their poll tax at the time of collecting taxes next preceding such election, shall be allowed to vote at any election in the State of Arkansas; provided, that persons who make satisfactory proof that they have attained the age of twenty-one years since the time of assessing taxes next preceding said election and possess the other necessary qualifications, shall be permitted to vote; and, provided further, and the said tax receipt shall be so marked by dated stamp or written endorsement by the judges of election to whom it may be first presented as to prevent the holder thereof from voting more than one at any election. It is declared to be the purpose of this amendment to deny the right of suffrage to aliens and it is declared to be the purpose of this amendment to confer suffrage equally upon both men and women, without regard to sex. Provided, that women shall not be compelled to serve on juries.

2. Arkansas Constitution, Art. 19, § 3, provides:

No person shall be elected to or appointed to fill a vacancy in any office who does not possess the qualifications of an elector.

3. Arkansas Constitution, Amendment 29, provides:

§ 1 Elective offices—Exceptions.

Vacancies in the office of United States Senator, and in all elective state, district, circuit, county, and township offices except those of Lieutenant Governor, Member of the General Assembly and Representative in the Congress of the United States, shall be filled by appointment by the Governor.

§ 2 Ineligible persons—Nepotism.

The Governor, Lieutenant Governor and Acting Governor shall be ineligible for appointment to fill any vacancies occurring or any office or position created, and resignation shall not remove such ineligibility. Husbands and wives of such officers, and relatives of such officers, or of their husbands and wives within the fourth degree of consanguinity or affinity, shall likewise be ineligible. No person appointed under Section 1 shall be eligible for appointment or election to succeed himself.

* * *

§ 5 Election to fill—Placing names on ballots.

Only the names of candidates for office nominated by an organized political party at a convention of delegates, or by a majority of all the votes cast for candidates for the office in a primary election, or by petition of electors as provided by law, shall be placed on the ballots in any election.

4. Arkansas Constitution, Amendment 51, § 17, provides:

This amendment supersedes and repeals the requirement of Amendment No. 8 [amending Art. 3, § 1] that a poll tax receipt be presented prior to registration or voting, and further supersedes and repeals Act 19 of 1964 and all other laws or parts of laws in conflict herewith.

Statutes

1. Arkansas Code Ann. § 7-3-108 provides:

Communist or subversive parties—New parties—Affidavit required—Penalty.

(a) No political party shall be recognized, qualified to participate, or permitted to have the names of its candidates printed on the ballot in any election in this state:

(1) Which is directly or indirectly affiliated by any means whatsoever with the Communist Party of the United States, the Communist International, or any other foreign agency, political party, organization, or government; or

(2) Which either directly or indirectly advocates, teaches, justifies, aids, or abets the overthrow by force or violence, or by any unlawful means, of the government of the United States or this state; or

(3) Which directly or indirectly carries on, advocates, teaches, justifies, aids, or abets a program of sabotage, force and violence, sedition, or treason against the government of the United States or this state.

(b) No newly organized political party shall be recognized or qualified to participate or permitted to have the names of its candidates printed on the ballot in any election in this state until it has filed an affidavit, by the officers of the party in this state under oath that:

(1) It is not directly or indirectly affiliated by any means whatsoever with the Communist Party of the United States, the Third Communist International, or any other foreign agency, political party, organization, or government; or

(2) It does not either directly or indirectly advocate, teach, justify, aid, or abet the overthrow by

force or violence, or by any unlawful means, of the government of the United States or this state; or

(3) It does not directly or indirectly carry on, advocate, teach, justify, aid, or abet a program of sabotage, force and violence, sedition, or treason against the government of the United States or this state. The affidavit shall be filed with the Secretary of State, and he shall make any investigation as he may deem necessary to determine the character and nature of the political doctrines of the proposed new party. If he finds that the proposed new party advocates doctrines or has affiliations which are in violation of the provisions of this act, he shall not permit the party to participate in the election.

(c) Any person who shall violate any provision of this section shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) and, in addition thereto, may be imprisoned for not more than six (6) months.

2. Arkansas Code Ann. § 7-5-207 provides:

Ballots—Names included.

(a) All election ballots provided by the county board of election commissioners of any county in this state for any election shall contain in the proper place the name of every candidate whose nomination for any office to be filled at that election has been certified to the commissioners and shall not contain the name of any candidate or person who has not been certified. If any candidate shall, prior to the printing of the ballots, notify the secretary of the state committee in the case of a United States, state, or district office, or the secretary of the county committee in the case of a county, city or township office, in writing, signed by the candidate, and acknowledged before an officer authorized to take acknowledgments, of his desire to withdraw as a

candidate for the office or position, the name of the person shall not be printed on the ballot at the general or special election.

(b) No person's name shall be printed upon the ballot as a candidate for any public office in this state at any election unless the person is qualified and eligible at the time of filing as a candidate for the office to hold the public office for which he is a candidate, except if a person is not qualified to hold the office at the time of filing because of age alone, the name of the person shall be printed on the ballot as a candidate for the office if the person will qualify to hold the office at the time prescribed by law for taking office.

3. Arkansas Code Ann. § 7-7-101 provides:

Selection of nominees.

The name of no person shall be printed on the ballot in any general or special election in this state as a candidate for election to any office unless the person shall have been certified as a nominee selected pursuant to this subchapter.

4. Arkansas Code Ann. § 7-7-102 provides:

Party nominees certified at primary election.

(a) Nominees of any political party for United States Senate, United States House of Representatives, state, district, or county office to be voted upon at a general election shall be certified as having received a majority of the votes cast for the office, or as an unopposed candidate, at a primary election held by the political party in the manner provided by law.

(b) Nominees of any political party for township or municipal office shall be declared by certification of a primary election as provided in subsection (a) of this section.

5. Arkansas Code Ann. § 7-7-103 provides:

Filing as an independent—Petitions—Disqualification.

* * *

(b) Any person desiring to have his name placed upon the ballot as an independent candidate without political party affiliation for any state, county, township, or district office in any general election in this state shall file as an independent candidate in the manner provided in this section no later than the date fixed by law as the deadline for filing political practice pledges and party pledges if any are required by the rules of the party to qualify as a candidate of a political party in a primary election or the first day of May, whichever is later.

(c)(1) He shall furnish, at the time he files as an independent candidate, petitions signed by not less than three percent (3%) of the qualified electors in the county, township, or district in which the person is seeking office, but in no event shall more than two thousand (2,000) signatures be required for a district office.

(2) If the person is a candidate for state office or for United States Senator in which a statewide race is required, the person shall file petitions signed by not less than three percent (3%) of the qualified electors of the state, or ten thousand (10,000) signatures of qualified electors, whichever is the lesser. Each elector signing the petition shall be a registered voter, and the petition shall be directed to the official with whom the person is required by law to file nomination certificates to qualify as a candidate, requesting that the name of the person be placed on the ballot for election to the office mentioned in the petition.

(3) Petitions shall be circulated not earlier than sixty (60) calendar days prior to the deadline for

filing petitions to qualify as an independent candidate.

* * *

(f) A person who has been defeated in a party primary shall not be permitted to file as an independent candidate in the general election for the office for which he was defeated in the party primary.

6. Arkansas Code Ann. § 7-7-203 provides:

Dates.

(a) The general primary election shall be held on the second Tuesday in June preceding the general election.

(b) The preferential primary election shall be held on the Tuesday two (2) weeks prior to the general primary election.

(c) Party pledges, if any, and political practice pledges for primary elections shall be filed, and ballot fees shall be paid, during regular office hours in the period beginning at 12:00 noon on the third Tuesday in March and ending at 12:00 noon on the fourteenth day thereafter, before the preferential primary election. Party pledges, if any, and political practice pledges shall be filed, and ballot fees for special primary elections shall be paid, on or before the deadline established by proclamation of the Governor. Pledges and ballot fees for a new political party shall be filed and paid as provided in subsection (g) of this section. However, this subsection does not apply to preferential presidential primary candidates.

(d) No later than forty (40) days before the preferential primary election, the chairman and secretary of the state committee of the political party shall certify to the various county committees the

names of all candidates who have qualified with the state committee for election by filing the party pledge and paying the ballot fee within the time required by law.

* * *

(g) Any group of voters desiring to form a new political party may do so by filing a petition with the Secretary of State. The petition shall contain the signatures of qualified electors of this state equal in number to at least three percent (3%) of the total vote cast for the Office of Governor or nominees for presidential electors, whichever is less, at the last preceding election. The petitions shall be filed with the Secretary of State no later than 12:00 noon on the first Tuesday in the fourth calendar month before the preferential primary election. The petitions shall be circulated during the period beginning one hundred twenty (120) calendar days prior to the deadline for filing the petitions with the Secretary of State. However, this subsection does not apply to preferential presidential primary elections.

7. Arkansas Code Ann. § 7-7-301 provides:

Party pledges and ballot fees.

(a) On or before the time in § 7-7-203(c), all candidates at primary elections held by political parties shall file any pledge required by such party and shall pay the ballot fees required by the party, as follows:

(1) Candidates for United States Senator, Representative in Congress, and all state offices shall file the pledge and pay the ballot fees with the secretary of the state committee of the political party or his designated agent; . . .

* * *

(b)(1) Before the name of any person shall appear on the primary ballot of a political party as a

candidate for any local, state, or federal office, the secretary of the county committee or the secretary of the state committee, as the case may be, of the political party must make an affirmative determination that the person complies with the eligibility requirements of the office.

(2) The secretary of the county committee or state committee, as the case may be, shall require an affidavit of eligibility from the candidate, and the secretary may make such independent investigation as he deems necessary to determine the eligibility of the candidate to serve in the office he seeks, including the power to compel the person to answer interrogatories. The affidavit of eligibility shall be filed along with the filing fee and party pledge, and the investigation concerning the eligibility shall be concluded within two (2) weeks after the filing deadline for nomination.

(c) The county clerk shall not accept for filing the political practices pledge of any candidate for nomination by a political party to any county office, nor shall the Secretary of State accept for filing the political practice pledge of any candidate for nomination by a political party to any district office, unless the candidate first furnishes written evidence of payment of all ballot fees required by the political party for candidates for the office of which the person is seeking nomination and written evidence of the filing of all party pledges required by the political party, if any. "Written evidence" shall mean a written statement or receipt signed by the secretary or chairman of the county committee or the state committee, as the case may be, of the political party evidencing payment of the fees and filing of the party pledge, if any, required by the political party.

(d) Any candidate who shall fail to file the party pledge and pay the ballot fee at the time and in the

manner as provided in this section shall not have his name printed on the ballot at any primary election.

* * *

8. Arkansas Code Ann. § 7-8-101 provides:

Primaries—General law governs.

All primaries, preferential and general, for the selection of nominees for federal offices, including those of the United States Senators and Representatives, shall be held on the same date and in the same manner as the preferential and general primaries for state, district, county, and township offices and shall be governed by the same procedure prescribed by this act.

* * *

9. Arkansas Code Ann. § 14-49-202 provides:

(a) No person on the commission shall hold or be a candidate for any office or public trust under any national, state, county, or municipal government, or school district, or be connected in any way in any official capacity with any political party or organization. . . .

10. Arkansas Code Ann. § 14-50-202 provides:

(a) Members of the civil service commission shall be citizens of the State of Arkansas and residents of the city for at least three (3) years immediately preceding their appointment.

(b)(1) No person on the commission shall hold or be a candidate for any political office under any national, state, county, or municipal government, or be connected in any official capacity with any political party or organization. . . .

11. Arkansas Code Ann. § 14-49-306 provides:

(a) No employee in any department affected by this chapter shall engage in the solicitation of any

subscription funds or assessments, or contribute thereto, for any political party or purpose.

(b) An employee shall not be connected with any political campaign or political management, except to cast his vote and to express his personal opinion privately.

12. Arkansas Code Ann. § 14-50-306 provides:

(a) No employee in any department affected by this chapter shall engage in the solicitation of any subscription funds or assessments, or contribute thereto, for any political party or purpose.

(b) An employee shall not be connected with any political campaign or political management except to cast his vote and to express his personal opinion privately.

13. Arkansas Code Ann. § 16-90-112(b) provides:

Every person convicted of bribery or felony shall be excluded from every office of trust or profit and from the right of suffrage in this state.

APPENDIX G

EXAMPLES OF OTHER STATES'
ELECTION LAWS

1. Eligibility To Vote

Mississippi Const., Art. 12, § 250, provides:

All qualified electors and no others shall be eligible to office, except as otherwise provided in this Constitution; provided, however, that as to an office where no other qualification than that of being a qualified elector is provided by this Constitution, the legislature may, by law, fix additional qualifications for such office.

Nevada Const., Art. 15, § 3, provides:

Eligibility for public office.

No person shall be eligible to any office who is not a qualified elector under this constitution.

[See also requirements of voter eligibility at pages 57a-67a, *infra*.]

2. District Residency

Idaho Code § 34-1904 provides:

All candidates for election as representatives in Congress shall be residents of the congressional district from which they seek such election.

Nevada Rev. Stat. § 293.1755 provides:

Residence requirements for candidates: Additional requirement; penalties; exception.

1. In addition to any other requirement provided by law, no person may be a candidate for any office

unless, for at least 30 days before the close of filing of declarations of candidacy, acceptances of candidacy or affidavits of candidacy for the office which he seeks, he has been a legal resident of the state, district, county, township, city or other area prescribed by law to which the office pertains and, if elected, over which he will have jurisdiction or which he will represent. . . .

North Carolina Gen. Stat. § 163-106 provides:

. . . (f) Candidates required to file their notice of candidacy with the State Board of Elections under subsection (c) of this section shall file along with their notice a certificate signed by the chairman of the board of elections or the supervisor of elections of the county in which they are registered to vote, stating that the person is registered to vote in that county,

3. Durational Residency

Arizona Rev. Stat. Ann. § 16-311 provides:

A. Any person desiring to become a candidate at a primary election for a political party and to have his name printed on the official ballot shall be a qualified elector of such party.

* * * *

E. The nomination paper of a candidate for the office of United States senator, or representative in Congress or for a state office, including a member of the legislature, or for any other office for which the electors of the entire state or a subdivision of the state greater than a county are entitled to vote, shall be filed with the secretary of state no later than five o'clock p.m. on the last date for filing.

* * * *

Arizona Rev. Stat. Ann. § 16-101 provides:

Qualifications of registrant; definition.

A. Every resident of the state is qualified to register to vote if he:

* * * *

3. Will have been a resident of the state twenty-nine days next preceding the election, except as provided in § 16-126. . . .

Colorado Rev. Stat. § 1-4-802 provides:

Petitions for nominating independent candidates.

(1) Candidates for public offices to be filled at a general or congressional vacancy election who do not wish to affiliate with a political party may be nominated, other than by a primary election or a convention, in the following manner:

* * * *

(g) No person shall be placed in nomination by petition unless the person is an eligible elector of the political subdivision or district in which the officer is to be elected and unless the person was registered as unaffiliated, as shown on the books of the county clerk and recorder, for at least twelve months prior to the date of filing of the petition;

Idaho Code § 34-604 provides:

. . . (2) No person shall be elected to the office of United States senator unless he has attained the age of thirty (30) years at the time of his election, has been a citizen of the United States at least nine (9) years and shall have resided within the state two (2) years next preceding his election.

(3) Each candidate shall file his declaration of candidacy with the secretary of state. Each declara-

tion shall have attached thereto a petition which shall contain the signatures of one thousand (1000) qualified electors. . . .

Idaho Code § 34-605 provides:

. . . (2) No person shall be elected to the house of representatives unless he has attained the age of twenty-five (25) years at the time of his election, has been a citizen of the United States at least seven (7) years and shall have resided within the state for two (2) years next preceding his election.

(3) Each candidate shall file his declaration of candidacy with the secretary of state. Each declaration shall have attached thereto a petition which shall contain the signatures of five hundred (500) qualified electors who reside within the congressional district. . . .

4. Disqualifications for Felonies

Alaska Stat. § 15.25.030 provides:

(a) A member of a political party who seeks to become a candidate of the party in the primary election shall execute and file a declaration of candidacy. The declaration shall be executed under oath before an officer authorized to take acknowledgements and shall state in substance:

* * *

(10) that the candidate is a qualified voter as required by law;

Alaska Const., Art. V, § 2 provides:

No person may vote who has been convicted of a felony involving moral turpitude unless his civil rights have been restored. No person may vote who has been judicially determined to be of unsound mind unless the disability has been removed.

Arizona Rev. Stat. Ann. § 13-904 provides:

A. A conviction for a felony suspends the following civil rights of the person sentenced:

* * *

2. The right to hold public office of trust or profit.

Connecticut Gen. Stat. § 9-46 provides:

Forfeiture of electoral rights

(a) A person shall forfeit his right to become an elector and his privileges as an elector upon conviction of a felony, except that a person convicted of the crime of nonsupport shall not forfeit such right or privileges.

(b) No person who has forfeited and not regained his privileges as an elector, as provided in section 9-46a, may be a candidate for or hold public office.

Hawaii Rev. Stat. § 38-831-2 provides:

Rights lost.

(a) A person sentenced for a felony, from the time of the person's sentence until the person's final discharge, may not:

* * *

(2) Become a candidate for or hold public office. . . .

Missouri Rev. Stat. § 115.349 provides:

. . . 3. Each declaration of candidacy for nomination in a primary election shall . . . be in substantially the following form:

I, _____, a resident and registered voter of the _____ precinct of the township of _____.

Missouri Rev. Stat. § 115.133 provides:

. . . 2. No person who is adjudged incapacitated shall be entitled to register or vote. No person shall be entitled to vote:

(1) While confined under a sentence of imprisonment;

(2) While on probation or parole after conviction of a felony, until finally discharged from such probation or parole; or

(3) After conviction of a felony or misdemeanor connected with the right of suffrage.

New Hampshire Rev. Stat. Ann. § 607-A:2 provides:

Rights Lost.

I. A person sentenced for a felony, from the time of his sentence until his final discharge, may not:

* * *

(b) Become a candidate for or hold public office. . . .

New Jersey Stat. Ann. § 19:13-8 provides:

Acceptance of nomination; annexation of oath of allegiance.

A candidate nominated for an office in a petition shall manifest his acceptance of such nomination by a written acceptance thereof. . . . Such acceptance shall certify that the candidate is a resident of and a legal voter in the jurisdiction of the office for which the nomination is made. . . .

New Jersey Stat. Ann. § 19:4-1 provides:

No person shall have the right of suffrage—

* * *

(6) Who has been convicted of a violation of any of the provisions of this Title, for which criminal penalties were imposed, if such person was deprived of such right as part of the punishment therefor according to law unless pardoned or restored by law to the right of suffrage; or

(7) Who shall be convicted of the violation of any of the provisions of this Title, for which criminal penalties are imposed, if such person shall be deprived of such right as part of the punishment therefor according to law, unless pardoned or restored by law to the right of suffrage; or

(8) Who is serving a sentence or is on parole or probation as the result of a conviction of any indictable offense under the laws of this or another state or of the United States.

North Carolina Gen. Stat. § 163-106 provides:

(a) Notice and Pledge.—No one shall be voted for in a primary election unless he shall have filed a notice of candidacy . . . in the following form:

. . . I affiliate with the _____ party, (and I certify that I am now registered on the registration records of the precinct in which I reside as an affiliate of the _____ party.)

I pledge that if I am defeated in the primary, I will not run for any office as a write-in candidate in the next general election. . . .

North Carolina Gen. Stat. § 163-55 provides:

The following classes of persons shall not be allowed to register or vote in this State:

* * * *

(2) Any person adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, unless that person shall be first restored to the rights of citizenship in the manner prescribed by law.

Ohio Rev. Code Ann. § 2961.01 provides:

A person convicted of a felony under the laws of this or any other state or the United States, unless his conviction is reversed or annulled, is incompetent to be an elector or juror, or to hold an office of honor, trust, or profit. . . .

West Virginia Code § 3-5-7 provides:

Any person who is eligible to hold and seek to hold an office or political party position to be filled by election in any primary or general election held under the provisions of this chapter shall file a certificate of announcement declaring as a candidate for the nomination or election to such office.

* * *

(b) The certificate of announcement shall be in a form . . . on which the candidate shall make a sworn statement . . . containing the following information:

* * *

(4) The county of residence and a statement that the candidate is a legally qualified voter of that county; . . .

West Virginia Code § 3-1-3 provides:

. . . But no person who has not been registered as a voter as required by law, or who is a minor, or of unsound mind, or who is under conviction of treason, felony or bribery in an election, or who is not a bona fide resident of the state, county or municipality in which he offers to vote, shall be permitted to vote at such election while such disability continues.

5. Disqualifications for Particular Offenses

Alabama Code § 17-16-12 provides:

The name of no candidate shall be printed upon any official ballot used at any primary election unless

such person is legally qualified to hold the office for which he is a candidate and unless he is eligible to vote in the primary election in which he seeks to be a candidate. . . .

Alabama Const., Art. VIII, § 182, provides:

The following persons shall be disqualified both from registering, and from voting, namely:

All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote another, or of making or offering to make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or register to secure the registration of any person as an elector.

Kentucky Rev. Stat. Ann. § 121A.990(1)(a) provides:

Any slate of candidates, authorized treasurer, or any other individual who knowingly violates the expenditure limitations imposed by KRS 121A.030 or the contribution limitations imposed by KRS 121A.050, knowing misuses any transfers from the fund in violation of KRS 121A.110, or knowingly falsifies any record required to be submitted or re-

tained by the slate under this chapter shall be guilty of a Class D felony, and shall be disqualified from being appointed to or becoming a candidate for public office, or holding public office, for a period of five (5) years from the date of final judicial determination of guilt.

Michigan Comp. Laws § 168.91 provides:

United States senator; eligibility

A person shall not be a United States senator unless the person has attained the age of 30 years and has been a citizen of the United States for 9 years, and is, when elected, an inhabitant of that state for which he or she shall be chosen as provided in section 3 of article 1 of the United States constitution. A person who has been convicted of a violation of section 12a(1) of Act No. 370 of the Public Acts of 1941, being section 38.412a of the Michigan Compiled Laws, shall not be eligible to the office of United States senator for a period of 20 years after conviction.

Michigan Comp. Laws § 168.131 provides:

Representative in Congress; eligibility

A person shall not be a representative unless the person has attained the age of 25 years and been a citizen of the United States for 7 years, and is, when elected, an inhabitant of that state in which he or she shall be chosen, as provided in section 2 of article 1 of the United States Constitution. A person who has been convicted of a violation of section 12a(1) of Act No. 370 of the Public Acts of 1941, being section 38.412a of the Michigan Compiled Laws, shall not be eligible to the office of representative in congress for a period of 20 years after conviction.

Michigan Comp. Laws § 38.412a provides:

(1) A member or employee of a county civil service commission or an officer or employee of a county which has adopted this act, being Act. No. 370 of the Public Acts of 1941, shall not provide a copy of the examination given to applicants for appointments to the classified service pursuant to section 12 or a copy of the answers to the examination to an applicant or other person who is not a member or employee of the county civil service commission before the examination is held. . . .

(2) An applicant for appointment to the classified service shall not possess a copy of the examination given to applicants for appointment to the classified service pursuant to section 12 or the answers to the examination, prior to the time the examination is given. A person who violates this subsection is guilty of a misdemeanor, punishable by imprisonment for not more than 90 days, or a fine of not more than \$1,000.00, or both. . . .

Mississippi Const., Art. 12, § 250, provides:

All qualified electors and no others shall be eligible to office, except as otherwise provided in this Constitution; provided, however, that as to an office where no other qualification than that of being a qualified elector is provided by this Constitution, the legislature may, by law, fix additional qualifications for such office.

Mississippi Code Ann. § 23-15-19 provides:

Any person who has been convicted of any crime listed in Section 241, Mississippi Constitution of 1890, shall not be registered, or if registered the name of such person shall be erased from the registration book on which it may be found by the registrar or by the election commissioners.

Rhode Island Gen. Laws § 17-23-4 provides:**Fraudulent or repeat voting.**

Every person who in any election shall fraudulently vote or attempt to vote, not being qualified notwithstanding that person's name may be on the voting list at the polling place where the person shall vote or attempt to vote; . . . or who shall aid, counsel, or procure any other person to so vote or attempt to vote, shall be guilty of a felony, and no person after conviction of such an offense shall be permitted to vote in any election or upon any proposition pending before the people, or to hold any public office. . . .

Rhode Island Gen. Laws § 17-23-5 provides:**Bribery or intimidation of voters—Immunity of witnesses in bribery trials.**

Every person who shall directly or indirectly give, or offer to agree to give, to any elector or to any person for the benefit of any elector, any sum of money or other valuable consideration for the purpose of inducing the elector to give in or withhold that elector's vote at any election in this state, or by way of reward for having voted or withheld that elector's vote, or who shall use any threat or employ any means of intimidation for the purpose of influencing the elector to vote or withhold that elector's vote for or against any candidate or candidates or proposition pending at an election, shall be guilty of a felony, and no person after conviction of such an offense shall be permitted to vote in any election or upon any proposition pending before the people, or to hold any public office;

6. Disqualifications for Mental Incompetency**Arizona Rev. Stat. Ann. § 16-311 provides:**

A. Any person desiring to become a candidate at a primary election for a political party and to have

his name printed on the official ballot shall be a qualified elector of such party. . . . A candidate for public office shall be a qualified elector at the time of filing and shall reside in the county, district or precinct which he proposes to represent. . . .

* * * *

C. The nomination paper of a candidate for the office of presidential elector, United States senator, representative in Congress or for a state office, including a member of the legislature, or for any other office for which the electors of the entire state or a subdivision of the state greater than a county are entitled to vote, shall be filed with the secretary of state no later than five o'clock p.m. on the last date for filing. . . .

Arizona Rev. Stat. Ann. § 16-101 provides:

Qualifications of registrant; definition.

A. Every resident of the state is qualified to register to vote if he:

* * * *

6. Has not been adjudicated an incapacitated person as defined in § 14-5101. . . .

New Jersey Stat. Ann. § 19:13-8 provides:

A candidate nominated for an office in a petition shall manifest his acceptance of such nomination by a written acceptance thereof, signed by his hand, upon or annexed to such petition, to which shall be annexed the oath of allegiance prescribed in section 41:1-1 of the Revised Statutes. . . . Such acceptance shall certify that the candidate is a resident of and a legal voter in the jurisdiction of the office for which the nomination is made. . . .

New Jersey Stat. Ann. § 19:4-1 provides:

No person shall have the right of suffrage—

(1) Who is an idiot or is insane;

North Dakota Cent. Code § 44-01-01 provides:

Eligibility to office.

Every elector is eligible to the office for which he is an elector, except when otherwise specially provided. No person is eligible who is not such an elector.

North Dakota Const., Art. 2, § 2, provides:

No person who has been declared mentally incompetent by order of a court or other authority having jurisdiction, which order has not been rescinded, shall be qualified to vote. No person convicted of a felony shall be qualified to vote until his or her civil rights are restored.

7. Prohibitions of Dual Candidacy

Alaska Stat. § 15.25.030(a) provides:

A member of a political party who seeks to become a candidate of the party in the primary election shall execute and file a declaration of candidacy. The declaration shall be executed under oath before an officer authorized to take acknowledgments and shall state in substance:

* * *

(14) that the person is not a candidate for any other office to be voted on at the primary or general election and that the person is not a candidate for this office under any other declaration of candidacy or nominating petition;

California Elec. Code § 6402 provides:

* * *

(b) No person may file nomination papers for a party nomination and an independent nomination for the same office, or for more than one office at the same election.

Georgia Code Ann. § 21-2-136 provides:

No person shall be nominated, nor shall any person be a candidate in a primary or election, for more than one of the following public offices to be filled at any one election: Governor, Lieutenant Governor, Secretary of State, Attorney General, State School Superintendent, Commissioner of Insurance, Commissioner of Agriculture, Commissioner of Labor, United States senator or representative in Congress, Public Service Commissioner, Justice of the Supreme Court, Judge of the Court of Appeals, judge of the probate court, clerk of the superior court, tax commissioner, tax collector, sheriff, judge of the superior court, county treasurer, county school superintendent, tax receiver, and members of the Senate and House of Representatives of the General Assembly.

Maine Rev. Stat. Ann., tit. 21-A, § 331(3), provides:

The following limitations apply to all candidates for nominations.

A. A person may not file, whether by primary election or nomination petition, as a candidate for more than one federal, state or county office at any election, except for a candidate for membership in a county charter commission under section 351, subsection 3. . . .

Oklahoma Stat. § 26-5-106 provides:

Candidates may file for no more than one office at any election.

South Dakota Cod. Laws § 12-6-3 provides:

No person shall be a candidate for nomination to more than one public office. . . .

West Virginia Code § 3-5-7(e) provides:

No person shall be a candidate for more than one office or office division at any election. . . .

8. Disqualifications of State Officials and Employees

Alabama Code § 36-26-38 provides:

. . . No employee in the classified service shall be a member of any national, state or local committee of a political party or an officer of a partisan political club or a candidate for nomination or election to any public office or shall take any part in the management or affairs of any political party or in any political campaign, except on his personal time and to exercise his right as a citizen privately to express his opinion and to cast his vote;

Alaska Stat. § 39.25.160 provides:

. . . (e) An employee in the classified or partially exempt service who seeks nomination or becomes a candidate for state or national elective political office shall immediately resign any position held in the state service. The employee's position becomes vacant on the date the employee files a declaration of candidacy for state or national elective office. . . .

Arizona Const., Art. XXII, § 18, provides:

Except during the final year of the term being served, no incumbent of a salaried elective office, whether holding by election or appointment, may offer himself for nomination or election to any salaried local, State or federal office.

Arizona Rev. Stat. Ann. § 41-772 provides:

. . . B. An employee or member of the personnel board shall not be a member of any national, state or local committee of a political party, an officer or chairman of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, shall not hold any paid, elective public office

Idaho Code § 67-5311 provides:

(1) No classified employee of a state department covered by this act shall:

* * * *

(c) Be a candidate and hold elective office in any partisan election. . . .

Indiana Code § 4-15-2-40 provides:

. . . [A]ny employee in the classified service who is elected to a state or federal public office shall be considered to have resigned from the service.

Kansas Stat. Ann. § 19-4330 provides:

(a) No officer, agent, clerk or employee of this state shall directly or indirectly use his authority or official influence to compel any officer or employee covered by the provisions of this act to apply for membership in or become a member of any organization, or to pay or promise to pay any assessment, subscription or contribution, or to take part in any political activity. . . .

(b) Any officer or employee covered by the provisions of this act shall resign from the service upon filing as a candidate for public office.

Kansas Stat. Ann. § 75-2953 provides:

. . . . (b) Any officer or employee in the state classified service shall resign from the service upon filing as a candidate for an elective office, unless the elective office filed for is a township elective office, a county elective office, an elective office in the judicial branch of government or is elected on a non-partisan basis. . . .

Kentucky Rev. Stat. Ann. § 18A.140 provides:

. . . (4) No employee in the classified service or member of the board or its executive director shall be a member of any national, state, or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office. . . .

Louisiana Const., Art. X, § 9, provides:

. . . No member of a civil service commission and no officer or employee in the classified service shall participate or engage in political activity; be a candidate for nomination or election to public office except to seek election as the classified state employee serving on the State Civil Service Commission; . . .

Louisiana Rev. Stat. Ann. § 42:39 provides:

A. After July 31, 1968, no person serving in or elected or appointed to the office of judge of any court, justices of the peace excepted, shall be eligible to hold or become a candidate for any national, state or local elective office of any kind whatsoever, including any national, state or local office in any political party organization, other than a candidate for the office of judge for the same or any other court.

B. The provisions of Subsection (A) of this section shall not be construed as prohibiting any person from resigning from his office as judge of any court for the purpose of becoming a candidate for nomination or election to any national, state or local elective office for which he is qualified and eligible; provided, however, that the resignation of any such person shall be and is made not less than twenty-four hours prior to the date on which he qualifies as a candidate for nomination or election to the office to which he seeks nomination or election.

C. If any judge elected or appointed, justice of the peace excepted, qualifies for any other elective position, other than those allowed by the provisions of this section, without complying with the provisions of Subsection (B) set forth above, his qualification as a candidate for the other office shall ipso facto be null and void.

North Carolina Gen. Stat. § 163-125 provides:

(a) No individual may qualify as a candidate for elective public office who holds another elective office, whether State, district, county or municipal, more than 40 days of the term of which runs concurrently with the term of office for which he seeks to qualify without resigning from such office prior to the last day of qualifying for the office he intends to seek. Said resignation shall be effective on or before the last day of qualifying. . . .

(e) This section does not apply to persons holding any elective federal office, nor does it apply to persons holding the office of judge or justice in the General Court of Justice who seek another office as a judge or justice in the General Court of Justice. . . .

Ohio Rev. Code Ann. § 124.57 provides:

. . . [N]or shall any officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships, be an officer in any political organization or take part in politics other than to vote as he pleases and to express freely his political opinions.

Oklahoma Stat., tit. 19, § 215.8, provides:

The district attorney shall be ineligible to be a candidate for any office which has a term any portion of which is the same as the term for which he was elected.

Texas Const. Art. XVI, § 65, provides:

The following officers elected at the General Election in November, 1954, and thereafter, shall serve for the full terms provided in this Constitution:

(a) District Clerks; (b) County Clerks; (c) County Judges; (d) Judges of the County Courts at Law, County Criminal Courts, County Probate Courts and County Domestic Relations Courts; (e) County Treasurers; (f) Criminal District Attorneys; (g) County Surveyors; (h) Inspectors of Hides and Animals; (i) County Commissioners for Precincts Two and Four; (j) Justices of the Peace. . . .

Provided, however, if any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office or profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall ex-

ceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled.

West Virginia Code § 29-6-20 provides:

(e) Notwithstanding any other provision of this code, no employee in the classified service shall:

* * *

(3) Be a candidate for any national or state paid public office or court of record; or hold any paid public office; . . .

9. Typical Primary Laws

Connecticut Gen. Stat. § 9-379 provides:

Eligibility for placing on ballot.

No name of any candidate shall be printed on any official ballot at any election except the name of a candidate nominated by a major or minor party unless a nominating petition for such candidate is approved by the secretary of the state as provided in sections 9-453a to 9-453p, inclusive.

Indiana Code § 3-8-7-25 provides:

Nominees entitled to have names on ballot.

The state election board and each county election board shall have printed on the respective general or municipal election ballots the names of the following candidates:

(1) Nominees chosen at a primary election under IC 3-10 and certified as required by this chapter.

(2) Nominees chosen by a convention of a political party in the state whose candidate received at least two percent (2%) of the total vote cast for secretary of state at the last election and certified under section 8 of this chapter.

(3) Nominees nominated by petition under IC 3-8-6.

Indiana Code § 3-8-2-8 provides:

(a) A declaration of candidacy for the office of United States Senator or for the office of governor must be accompanied by a petition signed by at least five thousand (5,000) voters of the state, including at least five hundred (500) voters from each congressional district. . . .

Kansas Stat. Ann. § 25-202(a) provides:

Except as otherwise provided in subsection (b) all candidates for national, state, county and township offices shall be nominated by: (1) a primary election held in accordance with article 2 of chapter 25 of the Kansas Statutes Annotated and amendments thereto; or (2) independent nomination petitions signed and filed as provided by existing statutes. . . .

Wyoming Stat. § 22-5-101 provides:

Nominations of candidates for all offices filled at a general election, except school and community college district offices and special district offices, may be made by primary election, by petition for nomination as an independent candidate as provided in W.S. 22-5-301 through 22-5-308 or by convention as provided in W.S. 22-4-303 and 22-4-406.

10. Non-Affiliation Requirements

California Election Code § 6401 provides:

(a) No declaration of candidacy for a partisan office or for membership on a county central com-

mittee shall be filed, by a candidate unless (1) at the time of presentation of the declaration and continuously for not less than three months immediately prior to that time, or for as long as he has been eligible to register to vote in the state, the candidate is shown by his affidavit of registration to be affiliated with the political party the nomination of which he seeks, and (2) the candidate has not been registered as affiliated with a qualified political party other than that political party the nomination of which he seeks within 12 months, or, in the case of an election governed by Chapter 7 (commencing with Section 7200), within three months immediately prior to the filing of the declaration.

(b) The county clerk shall attach a certificate to the declaration of candidacy showing the date on which the candidate registered as intending to affiliate with the political party the nomination of which he seeks, and indicating that the candidate has not been affiliated with any other qualified political party for the period specified in subdivision (a). . . .

Kentucky Rev. Stat. Ann. § 118.315 provides:

(1) A candidate for any office to be voted for at any regular election may be nominated by a petition of electors qualified to vote for him, complying with the provisions of subsection (2) of this section. No person who is a registered member of a political party shall be eligible to election as an independent candidate, nor shall any person be eligible to election as an independent candidate who was a registered member of a political party at the time of the last preceding regular election.

Kansas Stat. Ann. § 25-303 provides:

(b) All nominations other than party nominations shall be independent nominations. No person who has declared and retains a party affiliation in accordance with K.S.A. 25-3301 and amendments thereto

shall be eligible to accept an independent nomination for any office. . . .

North Carolina Stat. § 163-106 provides:

. . . (b) . . . No person shall be permitted to file as a candidate in a primary if, at the time he offers to file notice of candidacy, he is registered on the appropriate registration book or record as an affiliate of a political party other than that in whose primary he is attempting to file. . . .

Ohio Rev. Code § 3513.191 provides:

Qualification.

No person shall be a candidate for nomination or election at a party primary if he voted as a member of a different political party at any primary election within the current year and the next preceding two calendar years.

11. Affiliation Requirements

Alabama Code § 17-16-12 provides:

The name of no candidate shall be printed upon any official ballot used at any primary election unless such person is legally qualified to hold the office for which he is a candidate and unless he is eligible to vote in the primary election in which he seeks to be a candidate and possesses the political qualifications prescribed by the governing body of his political party.

Alaska Stat. § 15.25.030(a) provides:

A member of a political party who seeks to become a candidate of the party in the primary election shall execute and file a declaration of candidacy. The declaration shall be executed under oath before an officer authorized to take acknowledgments and shall state in substance:

* * * *

(16) that the candidate is registered to vote as a member of the political party whose nomination is being sought. . . .

Colorado Rev. Stat. § 1-4-101 provides:

. . . (3) All nominations by political parties for candidates for United States senator, representative in congress, all elective state, district, and county officers, and members of the general assembly shall be made by primary elections. Neither the secretary of state nor any county clerk and recorder shall place on the official general election ballot the name of any person as a candidate of any political party who has not been nominated in accordance with the provisions of this article, or who has not been affiliated with the political party for at least twelve months unless otherwise provided by law, or who does not meet residency requirements for the office, if any. . . .

Florida Stat. ch. 99.021(b) provides:

(b) In addition, any person seeking to qualify for nomination as a candidate of any political party shall, at the time of subscribing to the oath or affirmation, state in writing:

1. The party of which he is a member.
2. That he is not a registered member of any other political party and has not been a candidate for nomination for any other political party for a period of 6 months preceding the general election for which he seeks to qualify. . . .

Maryland Code Ann., Art. 33, § 4A-1(a), provides:

Each person seeking nomination to any public or party office at a primary election shall file a certificate of candidacy for nomination in the manner and at the time provided in this subtitle. . . . A candidate for any federal, State, local or party office shall be

affiliated with the party whose nomination or office he seeks. . . .

12. Filing Fees

Alaska Stat. § 15.25.050(a) provides:

At the time the declaration is filed, each candidate shall pay a nonrefundable filing fee to the director. The filing fee for candidates for office of governor, lieutenant governor, United States senator, and United States representative is \$100. The filing fee for candidates for office of state senator and state representative is \$30. . . .

California Election Code § 6552 provides:

Filing fees; salary

(a) The following fees for filing declarations of candidacy shall be paid to the Secretary of State by each candidate:

(1) Two percent of the first-year salary for the office of United States Senator or for any state office. The fee prescribed in this subdivision does not apply to the office of State Senator, Assemblyman, member of the Board of Equalization, or justice of the court of appeal.

(2) One percent of the first-year salary for the office of Representative in Congress, member of the Board of Equalization, or justice of the court of appeal. . . .

Minnesota Stat. § 204B.11 provides:

. . . [A] filing fee shall be paid by each candidate who files an affidavit of candidacy. The fee shall be paid at the time the affidavit is filed. The amount of the filing fee shall vary with the office sought as follows:

(a) for the office of governor, lieutenant governor, attorney general, state auditor, state treasurer,

secretary of state, representative in congress, judge of the supreme court, judge of the court of appeals, judge of the district court, or judge of the county municipal court of Hennepin county, \$300;

(b) for the office of senator in congress, \$400;

(c) for office of senator or representative in the legislature, \$100; . . .

Nevada Rev. Stat. § 293.193 provides:

1. Fees as listed in this section for filing declarations of candidacy or acceptances of candidacy must be paid to the filing officer by cash, cashier's check or certified check.

United States Senator	\$500
Representative in Congress	300
Governor	300
Justice of the supreme court	300
Any state office, other than governor or justice of the supreme court	200

Oregon Rev. Stat., tit. 23, § 249.056 provides:

Filing fees.

(1) At the time of filing a declaration of candidacy a candidate for the following offices shall pay to the officer with whom the declaration is filed the following fee:

(a) United States Senator, \$150.

(b) Governor, Secretary of State, State Treasurer, Attorney General, Commissioner of the Bureau of Labor and Industries, Superintendent of Public Instruction, Representative in Congress, judge of the Supreme Court, Court of Appeals or Oregon Tax Court, or executive officer or auditor of a metropolitan service district, \$100. . . .

13. "Spoiler" Laws.

Colorado Rev. Stat. § 1-4-105 provides:

Defeated candidate ineligible

No person who has been defeated as a candidate in a primary election shall be eligible for election to the same office by ballot or as a write-in candidate in the next general election unless the party vacancy committee nominates that person.

Georgia Code Ann. § 21-2-133(d) provides:

No person shall be eligible as a write-in candidate in a general or special election if such person was a candidate for nomination or election to the same office in the immediately preceding primary. . . .

Idaho Code § 34-704 provides:

. . . Candidates who file a declaration of candidacy under a party name and are not nominated at the primary election shall not be allowed to appear on the general election ballot under any other political party name, nor as an independent candidate.

Illinois Ann. Stat., ch. 10, § 5/10-2, provides:

. . . A candidate for whom a nomination paper has been filed as a partisan candidate at a primary election, and who is defeated for his or her nomination at the primary election, is ineligible for nomination as a candidate of a new political party for election in that general election.

Illinois Ann. Stat., ch. 10, § 5/10-3(4), provides:

. . . A candidate for whom a nomination paper has been filed as a partisan candidate at a primary election, and who is defeated for his or her nomination at the primary election, is ineligible to be placed on the ballot as an independent candidate for election in that general or consolidated election.

A candidate seeking election to an office for which candidates of political parties are nominated by caucus who is defeated for his or her nomination at such caucus, is ineligible to be listed on the ballot at that general or consolidated election as an independent candidate.

Illinois Ann. Stat., ch. 10, § 5/17-16.1 provides:

. . . A candidate for whom a nomination paper has been filed as a partisan candidate at a primary election, and who is defeated for his or her nomination at the primary election is ineligible to file a declaration of intent to be a write-in candidate for election in that general or consolidated election.

A candidate seeking election to an office for which candidates of political parties are nominated by caucus who is a participant in the caucus and who is defeated for his or her nomination at such caucus is ineligible to file a declaration of intent to be a write-in candidate for election in that general or consolidated election.

A candidate seeking election to an office for which candidates are nominated at a primary election on a nonpartisan basis and who is defeated for his or her nomination at the primary election is ineligible to file a declaration of intent to be a write-in candidate for election in that general or consolidated election. . . .

Indiana Code § 3-8-1-5.5(a) provides:

Except as provided in IC 3-13-1-19 and IC 3-13-2-10 for filling a vacancy on a ticket, a person who:

- (1) is defeated in a primary election; or
- (2) appears as a candidate for nomination at a state convention or files a declaration of

candidacy for nomination by a town convention and is defeated;

is not eligible to become a candidate for the same office in the next general or municipal election.

Kansas Stat. Ann. § 25-202(c) provides:

No candidate for any national, state, county or township office shall file for office as a partisan candidate in a primary election and also file for office as an independent candidate for any national, state, county or township office in the general election immediately following.

Kentucky Rev. Stat. Ann. § 118.345(1) provides:

(1) No candidate who has been defeated for the nomination for any office in a primary election shall have his name placed on voting machines in the succeeding regular election as a candidate for the same office for the nomination to which he was a candidate in the primary election. . . .

Maryland Code Ann., Art. 33, § 8-2, provides:

Name of defeated primary candidate not to be printed on general ballot.

(a) No person who has been defeated for the nomination for any office in a primary election . . . shall have his name printed on the ballot at the succeeding general election as a candidate for any office. Nothing in this subsection shall be interpreted as being applicable to candidates for nomination of their party for President of the United States who have been defeated in a Presidential preference primary election. . . .

Nebraska Rev. Stat. § 32-516 provides:

. . . No candidate defeated at the primary elections shall be permitted to file by petition in the general

election next following and this provision shall include candidates in counties and cities as well as candidates for nonpolitical offices.

New Hampshire Rev. Stat. Ann. § 659:91-a provides:

Candidate of One Party

I. Any person who is a candidate on any party's state primary election ballot shall not run as the nominee of a different party in the state general election unless he is successful in securing the nomination of his own party in the primary. Any person who runs as a candidate on any party's state primary election ballot and who is not chosen as the candidate for that party for the elective office for which he was a candidate shall not under any circumstances run as the nominee of a different party in the state general election. . . .

New Mexico Stat. Ann. § 8-1-8-19 provides:

If a person has been a candidate for the nomination of a major political party in the primary election, he shall not have his name printed on the ballot at the next succeeding general election except under the party name of the party designated on his declaration of candidacy filed for such primary election.

North Carolina Gen. Stat. § 163-123(e) provides:

(e) Defeated Primary Candidate.—No person whose name appeared on the ballot in a primary election preliminary to the general election shall be eligible to have votes counted for him as a write-in candidate for the same office in that year.

Ohio Rev. Code Ann. § 3513.04 provides:

No person who seeks party nomination for an office or position at a primary election by declaration of candidacy shall be permitted to become a

candidate at the following general election for any office by nominating petition or by write-in.

Oregon Rev. Stat., tit. 23, § 249.048 provides:

No candidate for nomination of a major political party to a public office who fails to receive the nomination shall be entitled to be the candidate of any other political party or to become an independent candidate for the same office at the succeeding general election. The filing office shall not certify the name of such a candidate.

South Carolina Code Ann. § 7-11-10 provides:

Nominations for candidates for the offices to be voted on in a general or special election may be by political party primary, by political party convention or by petition; provided, no person who was defeated as a candidate for nomination to an office in a party primary or party convention shall have his name placed on the ballot for the ensuing general or special election. . . .

South Dakota Cod. Laws § 12-7-5 provides:

No person shall file a certificate of nomination pursuant to § 12-7-1 for an office for which he has been a candidate in the primary election of the same year.

Tennessee Code Ann. § 2-5-101(f) provides:

. . . (3) No person defeated in a primary election shall qualify as an independent for the general election.

(4) No candidate in a party primary election may appear on the ballot in a general election as the nominee of a different political party, or as an independent. . . .

14. Loyalty and State Oaths

Hawaii Rev. Stat. § 2-12-7, provides:

The name of no candidate for any office shall be printed upon any official ballot, in any election, unless the candidate shall have taken and subscribed to the following written oath or affirmation, and filed the oath with the candidate's nomination papers.

The written oath or affirmation shall be in the following form:

"I, _____, do solemnly swear and declare, on oath that if elected to office I will support and defend the Constitution and laws of the United States of America, and the Constitution and laws of the State of Hawaii. . . .

Illinois Ann. Stat., ch. 10, § 5/7-10.1 provides:

Each petition or certificate of nomination shall include as part thereof, a statement for each of the candidates filing, or in whose behalf the petition or certificate of nomination is filed, said statement shall be subscribed and sworn to by such candidate or nominee before some officer authorized to take acknowledgment of deeds in this State and shall be in substantially the following form: . . .

I, _____ do swear that I am citizen of the United States and the State of Illinois, that I am not affiliated directly or indirectly with any communist organization or any communist front organization, or any foreign political agency, party, organization or government which advocates the overthrow of constitutional government by force or other means not permitted under the Constitution of the United States or the Constitution of this State; that I do not directly or indirectly teach or advocate the overthrow of the government of the United States or of this State or any unlawful change in the form of the

governments thereof by force or any unlawful means. . . .

Pennsylvania Stat. Ann., tit. 25, § 2938.1 provides:

Every person nominated at any primary election as the candidate of any political party for any office, . . . who has not filed the loyalty oath required by section 14, act of December 22, 1951 (P.L. 1726), known as the "Pennsylvania Loyalty Act", . . . shall . . . file such oath . . . at least eighty-five (85) days previous to the day of the general or municipal election at which such candidate's name would appear on the ballot. Failure to pay such fee or file such oath within the time herein prescribed shall result in a vacancy in such party nomination. . . .

AUG 16 1994

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

U.S. TERM LIMITS, *et al.*,
v. *Petitioners*

RAY THORNTON, *et al.*,
Respondents

STATE OF ARKANSAS ex rel. WINSTON BRYANT,
Attorney General of the State of Arkansas,
v. *Petitioner*

BOBBIE E. HILL, *et al.*,
Respondents

On Writ of Certiorari to the
Supreme Court of Arkansas

BRIEF FOR THE STATE PETITIONER

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QUESTION PRESENTED

Amendment 73 to the Arkansas Constitution restricts access to the ballot for certain candidates for the offices of United States Representative and Senator. Amendment 73 provides that a person who has been elected to three or more terms as a member of the United States House of Representatives, or to two or more terms as a member of the United States Senate, cannot thereafter have his or her name placed on the ballot for that office, although a candidate may still be elected through a write-in campaign. The question presented by this case is the following:

Whether a State has the power under the Elections Clause of the Constitution, Art. I, § 4, Cl. 1, to restrict an incumbent candidate's access to the ballot in such a manner, or whether the Qualifications Clauses of the Constitution, Art. I, § 2, Cl. 2, and § 3, Cl. 3, prohibit a State from imposing such a ballot access restriction.

PARTIES TO THE PROCEEDING

The following parties appeared in the court below:

Petitioner:

State of Arkansas ex. rel. Attorney General Winston Bryant

Respondents:

Bobbie Hill, individually and on behalf of the Arkansas League of Women Voters; Dick Herget, individually

State Constitutional Officers:

W. J. "Bill" McCuen, Secretary of State; Julia Hughes Jones, State Auditor; Jimmie Lou Fisher, State Treasurer; Winston Bryant, Attorney General; Charlie Daniels, Land Commissioner, individually and in their capacities as candidates for public office

United States Senators:

Dale Bumpers and David Pryor

United States Representatives:

Ray Thornton, Blanche Lambert, Jay Dickey and Tim Hutchinson; and former representatives Beryl Anthony, Bill Alexander and John Paul Hammer-schmidt

Members, Arkansas State Legislature, former and current:

Senate:

James C. "Jim" Scott, W. D. "Bill" Moore, Jr., Mike Ross, Wayne Dowd, Neely Cassady, George Hopkins, Jean C. Edwards, Jay Bradford, Bill Walters, Travis A. Miles, Lu Hardin, Eugene "Bud" Canada, Charlie Cole Chaffin, Vic Snyder, Jerry D. Jewell, Cliff Hoofman, Stanley Russ, Mike Beebe, Roy C. "Bill" Lewellen, Mike Everett, Steve Bell, Allen Gordon, Jon S. Fitch, Morrill Harriman, Mike Bearden, Jerry

P. Bookout, Mike Todd, Nick Wilson, Steve Luelf, Joe E. Yates, David R. Malone, Clarence Bell, Jack Anderson Gibson, Max Howell, John Pagan, Kevin Smith, Jim Keet, Bill Gwatney, and Reid Holiman

House:

Railey A. Steele, Jerry E. Hinshaw, Louis McJunkin, Charles W. Stewart, Bob Fairchild, Jerry Hunton, Edward F. Thicksten, B. G. Hendrix, Carolyn Pollan, Ralph "Buddy" Blair, Jr., Jerry D. King, W. R. "Bud" Rice, Ode Maddox, Gus Wingfield, Hoyer D. Horn, David Beatty, Arthur Carter, Charles Whorton, Jr., Frank J. Willems, Lloyd R. George, Keith Wood, Bob J. Watts, L. L. "Doc" Bryan, Bruce Hawkins, Ted E. Mullenix, James C. Allen, John W. Parkerson, Bob "Sody" Arnold, Judy Smith, John H. Dawson, Billy Joe Purdom, Roger L. Rorie, Randy Thurman, W. H. "Bill" Sanson, Bill Stephens, Larry Mitchell, H. Lacy Landers, Vero Easley, Bobby G. Newman, Jodie Mahony, Phil Wyrick, Myra Jones, Jim Argue, Jr., William L. "Bill" Walker, Jr., Mark Pryor, Irma Hunter Brown, Carol "Coach" Henry, James G. Dietz, Doug Wood, Mike Wilson, William H. Townsend, Larry Goodwin, John E. Miller, John Paul Capps, J. Sturgis Miller, Josetta E. Wilkins, Jacqueline J. Roberts, Charlotte Schexnayder, Jimmie Don McKissack, Michael K. Davis, Thomas G. Baker, Albert "Tom" Collier, V. O. "Butch" Calhoun, Wanda Northcutt, James T. Jordan, N.B. "Nap" Murphy, Jim Holland, Tim Woolridge, Bobby G. Wood, Bobby L. Hogue, Owen Miller, J. L. "Jim" Shaver, Pat Flanagan, Wayne Wagner, Walter M. Day, Christine Brownlee, Ben McGee, Lloyd C. McCuiston, Jr., Bob McGinnis, Ernest Cunningham, Jimmie L. Wilson, Bynum Gibson, Tim Hutchinson, James Edward "Ed" Gilbert, Richard L. "Dick" Barclay, Bill D. Porter, Tommy E. Mitchum, James H. "Jim" Roberts, William P. "Bill" Mills, Robert Vaughan "Bob" Teague, David E. Roberts, Arthur

"Art" Givens, Jr., Jack H. McCoy, Robert Wayne "Bobby" Tullis, John M. Lipton, G. W. "Buddy" Turner, Tom Forgey, Travis Dowd, Dana A. Moreland, Jim Von Gremp, Dave Bisbee, Randy Bryant, John Hall, Jim Hill, Dennis Young, Armil O. Curran, D. R. "Buddy" Wallis, Vada Sheid, Greg Wren, E. Ray Stalnaker, Mark Riabie, Dee Bennett, Joe Molinaro, David Choate, Bill Fletcher, Marian D. Owens, and Claud V. Cash

Others:

George O. Jernigan, Asa Hutchinson, Lula Binns, Shirley McFarlin, Richard Bifford and Bonnie Johnson, as members of the Arkansas State Board of Election Commissioners

Republican Party of Arkansas

Democratic Party of Arkansas

Arkansans for Governmental Reform, Inc., and Lawrence Cook, Timothy Jacob, Steve Munn, Tim Epperson, Lance Curtis, Miles King, David Jamison, Sy Mendenhall, Teresa Ulrey, Eual Petty, Tommy Munn, Tommy White, Dr. Bill McCollum, Richard Trubey, Leo Perry, Bruce Burks, Howard Studdard, J.D. Crow and Claudie Ray Ollar

U.S. Term Limits, Inc., Frank Gilbert, Greg Rice, Lon Schultz, and Spencer Plumley

Americans for Term Limits and Steve Goss

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED.....	2
STATEMENT	2
SUMMARY OF ARGUMENT	7
ARGUMENT	8
AMENDMENT 73 TO THE ARKANSAS CONSTITUTION IS A LAWFUL EXERCISE OF STATE AUTHORITY OVER THE ELECTORAL PROCESS	8
I. STATES HAVE BROAD POWER UNDER THE ELECTIONS CLAUSE AND THE TENTH AMENDMENT TO REGULATE FEDERAL ELECTIONS	9
A. States Have The Power To Regulate The Electoral Process For State And Federal Officials	9
1. States have the inherent power to regulate federal elections	9
2. States also have the power to regulate federal elections	10
B. Term Limits And Ballot Access Restrictions Are Reasonable Regulations Of The Electoral Process	18
II. STATES CAN RESTRICT ACCESS TO THE BALLOT FOR THE OFFICES OF REPRESENTATIVE AND SENATOR	27

TABLE OF CONTENTS—Continued

	Page
A. States Have The Authority Under The Elections Clause And The Tenth Amendment To Impose Ballot Access Restrictions For The Offices Of Representative And Senator	27
B. Amendment 73 Is A Permissible Ballot Access Restriction	34
III. STATES CAN IMPOSE TERM LIMITS ON THE OFFICES OF REPRESENTATIVE AND SENATOR	36
A. The Qualifications Clauses Do Not Prohibit The States From Imposing Qualifications For The Offices Of Representative And Senator..	36
B. <i>Powell v. McCormack</i> Does Not Prohibit States From Imposing Qualifications For The Offices Of Representative And Senator	44
CONCLUSION	48
APPENDIX A: Pertinent constitutional provisions..	1a
APPENDIX B: Term limits and qualifications on public officials prior to the adoption of the constitution	1b
APPENDIX C: State-imposed qualifications on members of Congress through the 19th century	1c
APPENDIX D: Contemporary term limits on governors or executive officers only	1d
APPENDIX E: Contemporary term limits for the governor, the state legislature, and members of the U.S. Congress	1e
APPENDIX F: States presently with term limits, but not for all positions	1f
APPENDIX G: States without term limits for any state or federal officers	1g
APPENDIX H: Municipalities with term limits on local officers	1h
APPENDIX I: Charts	1i

TABLE OF AUTHORITIES

Cases	Page
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	34
<i>Austin v. Michigan Chamber of Commerce</i> , 494 U.S. 652 (1990)	12
<i>Bowsher v. Synar</i> , 478 U.S. 714 (1986)	43
<i>Breedlove v. Suttles</i> , 302 U.S. 277 (1937)	12
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	26
<i>Bullock v. Carter</i> , 405 U.S. 134 (1972)	13
<i>Burdick v. Takushi</i> , 112 S. Ct. 2059 (1992)	11, 12, 27, 31, 34
<i>Burson v. Freeman</i> , 112 S. Ct. 1846 (1992)	12, 31
<i>Carrington v. Rash</i> , 380 U.S. 89 (1965)	11
<i>Carroll v. Becker</i> , 285 U.S. 380 (1932)	12
<i>City of Cleburne v. Cleburne Living Center, Inc.</i> , 473 U.S. 432 (1985)	33, 34
<i>Clements v. Fashing</i> , 457 U.S. 957 (1982)	10, 34
<i>Coyle v. Smith</i> , 221 U.S. 559 (1911)	10
<i>Danielson v. Fitzsimmons</i> , 232 Minn. 149, 44 N.W.2d 484 (1950)	11
<i>Davis v. Beason</i> , 133 U.S. 333 (1890)	12
<i>De Veau v. Braisted</i> , 363 U.S. 144 (1960)	43
<i>Duggan v. Beermann</i> , 515 N.W.2d 788 (Neb. 1994)	25
<i>Eu v. San Francisco Democratic Comm'n</i> , 489 U.S. 214 (1989)	13
<i>Gregory v. Ashcroft</i> , 111 S. Ct. 2395 (1991)	8, 10, 11, 39
<i>Guinn v. United States</i> , 238 U.S. 347 (1915)	11
<i>Hamilton v. McCuen</i> , No. 94-1475 (Pulaski Cnty. Chancery Ct. filed Mar. 11, 1994)	18
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<i>Koenig v. Flynn</i> , 285 U.S. 375 (1932)	12
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TABLE OF AUTHORITIES—Continued

	Page
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<i>Murphy v. Ramsey</i> , 114 U.S. 15 (1885)	12
<i>New York v. United States</i> , 112 S.Ct. 2408 (1992) ..	40
<i>Nixon v. Fitzgerald</i> , 457 U.S. 731 (1982)	45
<i>Nixon v. United States</i> , 113 S.Ct. 732 (1993)	36, 41
<i>Oregon v. Mitchell</i> , 400 U.S. 112 (1970)	13
<i>Personnel Adm'r v. Feeney</i> , 442 U.S. 256 (1979)	39
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969)	5, 8, 41, 44, 45
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<i>Richardson v. Ramirez</i> , 418 U.S. 24 (1974)	10
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<i>Roudebush v. Hartke</i> , 405 U.S. 15 (1972)	40, 12
<i>San Antonio Indep. School Dist. v. Rodriguez</i> , 411 U.S. 1 (1973)	33
<i>Smiley v. Holm</i> , 285 U.S. 355 (1932)	12, 32
<i>State v. Crane</i> , 197 P.2d 864 (Wy. 1948)	30
<i>State ex rel. Maloney v. McCartney</i> , 223 S.E.2d 607 (W. Va.), appeal dismissed for want of a substantial federal question, 425 U.S. 946 (1976)	33
<i>State ex rel. McCarthy v. Moore</i> , 92 N.W. 4 (Minn. 1902)	30
<i>State ex rel. O'Sullivan v. Swanson</i> , 257 N.W. 255-56 (Neb. 1934)	30

TABLE OF AUTHORITIES—Continued

	Page
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<i>Tashjian v. Republican Party of Connecticut</i> , 479 U.S. 208 (1986)	12, 13
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<i>United States Civil Service Comm'n v. National Ass'n of Letter Carriers</i> , 413 U.S. 548 (1973)	43
<i>Washington v. Davis</i> , 426 U.S. 229 (1976)	39
<i>Williams v. Mississippi</i> , 170 U.S. 213 (1898)	12
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968)	8
<i>Constitutions, statutes, and rules</i>	
U.S. Constitution Article I, § 2, Cl. 2	4, 11, 36, 44
Article I, § 2, Cl. 1	11
§ 3, Cl. 1	11
§ 3, Cl. 3	4, 36
§ 3, Cl. 7	37
§ 4, Cl. 1	4, 12, 13, 27
§ 5, Cl. 1	44, 45
§ 6, Cl. 2	37
§ 8, Cl. 1	36
§ 8, Cl. 4	36
§ 8, Cl. 17	36
§ 10, Cl. 1-3	38
Article II, § 1, Cl. 1-2	11
Article II, § 11, Cl. 1-3	36
Article VI, Cl. 3	37
Arts. of Confederation Art. V	21
First Amendment	4, 21
Tenth Amendment	4, 5, 6, 7, 8
Twelfth Amendment	11
Fourteenth Amendment	4, 11, 33, 37
Fifteenth Amendment	11
Seventeenth Amendment	11
Nineteenth Amendment	11
Twenty-Sixth Amendment	11

TABLE OF AUTHORITIES—Continued

	Page
Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 67	43
Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 117	43
Act of May 8, 1792, ch. 37, § 12, 1 Stat. 281	43
Act of Mar. 2, 1867, Stat. 428	43
Act of June 25, 1868, 15 Stat. 73	43
2 U.S.C. § 2(c) (1988)	14
5 U.S.C. §§ 7324-7327	43
28 U.S.C. § 1257(a)	2
18 U.S.C. § 201	43
§ 203	43
§ 592	43
§ 593	43
§ 1901	43
§ 2071	43
§ 2381	43
§ 2383	43
5 U.S.C. §§ 7324-7327	43
Alaska Const. Art. IV, § 14	16
Ariz. Const. Art. VII, § 18	24
Ark. Const. of 1836 § 8	31
Ark. Const. Art. 19, § 3	9, 17
Amend. 29, § 2	18
Amend. 50, §§ 1-4	10
Amend. 51, §§ 1-20	17
Amend. 73	10, 29, 32, 33, 35, 39
Cal. Const. art. II, § 2 (1976)	10
Cal. Const. art. 2, § 4	10
Colo. Const. Art. XVIII, § 9a	24
Fla. Const. of 1868 § 23	43
Fla. Const. Art. 6, § 4	24
Ga. Const. of 1976, Art. 2, ¶ III (1990)	9
Kan. Const. Art. V, § 2	9
Mich. Const. Art. II, § 10	24
Mo. Const. Art. III, § 45(a)	24
Mont. Const. Art. IV, § 4	9
Mont. Const. Art. IV, § 8	24
Neb. Const. Art. XV, § 20	24
N.C. Const. Art. VI, § 6	15

TABLE OF AUTHORITIES—Continued

	Page
N.C. Const. Art. VI, § 8	9
N.M. Const. Art. VII, § 2	9
Ohio Const. Art. V, § 8	24
Ore. Const. Art. II, § 20	25
Pa. Const. of 1776, § 11	14
Pa. Const. Art. 2, § 7	9
R.I. Const. Art. 3, § 1	16
S.D. Const. Art. III, § 32	24
Va. Const. Art. II, §§ 1, 5	9
Ga. Act of Jan. 23, 1789	14
Md. Act of Dec. 22, 1788, ch. 10, § VII	14
Mass. Res. of Nov. 19, 1788, ch. 49	14
N.C. Act of Dec. 16, 1789, ch. 1, § I	14
N.J. Act of Nov. 21, 1788, ch. 241, § 3	14
Tenn. Act of Aug. 3, 1796, ch. 1, § 2	14
Va. Act of Nov. 20, 1788, ch. 2, § II	13
Ala. Code § 17-7-1(a) (3) (Supp. 1993)	16
Ariz. Rev. Stat. Ann. § 38-296(A) (Supp. 1990-1991)	16
6A Ark. Code Ann. tit. 7, ch. 5-8 (Michie 1993)	10
6A Ark. Code Ann. § 7-1-103 (Michie 1993)	10
6A Ark. Code Ann. § 7-1-104 (Michie 1993)	10
6A Ark. Code Ann. § 7-1-101 to 7-2-105 (Michie Supp. 1993)	17
6A Ark. Code Ann. § 7-7-208(h) (3) (Michie Supp. 1993)	34
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6A Ark. Code Ann. § 7-4-101 to 108 (Michie Supp. 1993)	10
6A Ark. Code Ann. § 7-4-201 to 211 Michie (1993)	10
6A Ark. Code Ann. § 7-5-101 (Michie Supp. 1993)	10
6A Ark. Code Ann. § 7-5-205 (Michie Supp. 1993)	34
6A Ark. Code Ann. § 7-6-102(a) (1) (Michie Supp. 1993)	17
6A Ark. Code Ann. § 7-7-103(f) (Michie Supp. 1993)	16
6A Ark. Code Ann. § 7-7-103 (Michie 1993)	17

TABLE OF AUTHORITIES—Continued

	Page
6A Ark. Code Ann. § 7-7-301(c) (Michie Supp. 1993)	17
Cal. Elec. Code §§ 6831 & 6838 (West Supp. 1993) ..	16
Cal. Elec. Code §§ 25003 (Deering 1993)	24
Cal. Penal Code § 424 (Deering 1985)	9
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Del. Code Ann. tit. 15, § 4101 (1981)	16
Fla. Stat. Ann. § 99.096 (1982)	16
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Ill. Stat. Ch. 10, § 5/10-2	16
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Iowa Code Ann. § 43.20 (West Supp. 1992)	16
Haw. Rev. Stat. § 12-3 (Supp. 1991)	16
Haw. Rev. Stat. § 19-4 (1985)	10
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Kan. Stat. Ann. § 21-3901(b) (Supp. 1993)	9
Ky. Rev. Stat. Ann. § 118.315(2) (1993)	16
La. Rev. Stat. Ann. tit. 18, § 453A (Supp. 1993)	16
Me. Rev. Stat. Ann. tit. 21-A, § 351 (1993)	16
Md. Code Ann. Elec. § 8-2 (Supp. 1991)	16
Mich. Comp. Laws § 3350 (1929)	9
Mich. Comp. Laws Ann. § 6.1692-1693 (1993)	16
Minn. Stat. Ann. § 204B.06(c) (Supp. 1990-1991) ..	16
Miss. Code § 2907 (1993)	9
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N.Y. Elec. Law § 6-142 (McKinney Supp. 1993) ..	16
N.Y. Elec. Law §§ 136, 137, 139, 147, and 152 (consol. 1964) (superceded)	44
N.C. Gen. Stat. § 163-106 (1991)	16
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S.C. Code Ann. § 7-11-210 (Supp. 1992)	16
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TABLE OF AUTHORITIES—Continued

	Page
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TABLE OF AUTHORITIES—Continued

	Page
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TABLE OF AUTHORITIES—Continued

	Page
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TABLE OF AUTHORITIES—Continued

	Page
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Volume 2	13
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1456

U.S. TERM LIMITS, *et al.*,
v. *Petitioners*

RAY THORNTON, *et al.*,
Respondents

No. 93-1828

STATE OF ARKANSAS ex rel. WINSTON BRYANT,
Attorney General of the State of Arkansas,
v. *Petitioner*

BOBBIE E. HILL, *et al.*,
Respondents

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF FOR THE STATE PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas, 93-1456 Pet. App. (hereinafter Pet. App.) 1a-43a, is reported at 316 Ark. 251, 872 S.W.2d 349. The opinions of the circuit court, Pet. App. 45a-52a, 53a-62a, are unreported.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on March 7, 1994. A petition for rehearing was denied on March 14, 1994. Pet. App. 44a. The petition in No. 93-1456 was filed on March 18, 1994, and the petition in No. 93-1828 was filed on May 16, 1994. Both petitions were granted and consolidated on June 20, 1994. The jurisdiction of this Court rests under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Pertinent constitutional provisions are reprinted in App. A, *infra*.

STATEMENT

1. At issue in this case is whether the Constitution allows the States to structure their electoral procedures for the offices of United States Representative and Senator in order to ensure that the institutional advantages of incumbency (particularly long-term incumbency) neither create nor perpetuate modern-day legislative fiefdoms that, by crippling the ability of challengers to unseat officeholders, render the political process unresponsive to the electorate. The Framers of the Constitution envisioned frequent turnover for legislative offices, especially for the House of Representatives, whose members must stand for re-election biennially. For most of our history, the Framers' prediction was correct. But in recent decades, incumbents in the federal, state, and local political systems have been re-elected at an unprecedented—and, to some, alarming—rate.¹ In response to that trend, since 1990 more than 22 million votes have been cast in 15 States to enact state laws through citizen initiatives that either prohibit individuals from holding congressional office for more than a fixed number of terms or that restrict access

¹ Charts depicting that trend in Arkansas and nationwide are reprinted in App. I, *infra*.

to the ballot by incumbents, while still permitting them to be elected via write-in campaigns.

Starting in 1990, States began to experiment (more accurately, *reexperiment*) with term limits and, subsequently, ballot access laws as a way of addressing real and perceived flaws in today's electoral process. In that year, Oklahoma adopted a state constitutional amendment limiting legislative terms, while California and Colorado went a few steps further. California limited the terms of all statewide elected officials, including legislators, and Colorado imposed a 12-year cap on its delegates' service in Congress. In 1991, Washington voters rejected the retroactive imposition of term limits on state and federal officeholders, but the following year the voters approved a prospective ballot access law. Also in 1992, citizens in 13 other States approved laws imposing term limits on elected state and federal officials or (in different ways) restricting incumbents' opportunity to appear on the ballot. Sula P. Richardson, *Term Limits for Federal and State Legislators* 3-5 (CRS Report Mar. 28, 1994).

This case involves the constitutionality of one of the latter type of election laws. At the November 1992 general election, the Arkansas electorate, by a 60% to 40% margin, endorsed an initiative adopting Amendment 73 to the Arkansas Constitution. Amendment 73 limits the terms that can be held by certain state officers, such as the Governor, Lieutenant Governor, and Attorney General.² Amendment 73 also provides that a person who has been elected to three or more terms as a member of the United States House of Representatives, or to two or more terms as a member of the United States Senate, cannot thereafter have his or her name placed on the

² State offices are not governed by the Qualifications Clauses of Article I, which apply only to United States Representatives and Senators. The Arkansas Supreme Court upheld the term limits imposed by Amendment 73 on state officers, and that aspect of the ruling below is not before the Court.

ballot for that office, although a candidate may still be elected through a write-in campaign. Amendment 73 rests on the belief, as stated in its preamble, that "elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people." The Amendment was designed to rectify the deleterious effects of "[e]ntrenched incumbency," which have included "reduced voter participation and an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers." The question presented by this case is whether the Elections Clause of the Constitution, Art. I, § 4, Cl. 1, and the Tenth Amendment permit the State to remedy those ills through Amendment 73, or whether the Qualifications Clauses, Art. I, § 2, cl. 2, and § 3, Cl. 3, prohibit Arkansas from pursuing such corrective action.

2. In November 1992, respondents Bobbie E. Hill, *et al.*, filed a complaint in the Circuit Court of Pulaski County, seeking a declaratory judgment that Amendment 73 to the Arkansas Constitution was unconstitutional under Articles I and IV of the Constitution of the United States and the First and Fourteenth Amendments, insofar as Amendment 73 impaired the ability of an incumbent Representative or Senator to be re-elected. On cross-motions for summary judgment, the circuit court held that Amendment 73 violated state law and the Qualifications Clauses of the Constitution, Art. I, § 2, Cl. 2, and § 3, Cl. 3. Pet. App. 45a-52a, 53a-62a. The court reasoned that "[Amendment 73] is purely and simply a restriction on the qualifications of a person seeking federal congressional office," *id.* at 49a, and that the Qualifications Clauses forbid States from imposing qualifications on federal officeholders in addition to the ones set forth in Article I, *id.* at 48a-49a.³

³ The circuit court rejected respondents' contentions that Amendment 73 violated Article IV of the Constitution, as well as the First and Fourteenth Amendments. Pet. App. 59a, 60a.

3. By a divided vote, the Arkansas Supreme Court affirmed in part and reversed in part. Pet. App. 1a-43a. The Court held that Amendment 73 is not invalid under state law, but does violate Article I of the Constitution.

a. A plurality concluded that the historical background to the adoption of the Qualifications Clauses was "helpful" but ultimately "inconclusive regarding the issue at hand." Pet. App. 12a. Nevertheless relying, *inter alia*, on that history and *Powell v. McCormack*, 395 U.S. 486 (1969), the plurality reasoned that Article I "enumerated three benchmarks for congressional service—age, citizenship, and residency"—and that "[n]o other qualifications were included." *Id.* at 12a. That conclusion is a sensible one, the plurality wrote, since it ensures that the qualifications for Representatives and Senators are uniform nationwide. *Id.* at 14a.

The plurality also ruled that Amendment 73 cannot be upheld as an exercise of the State's power to regulate candidates' access to the ballot. Pet. App. 14a-15a. The plurality reasoned that the intent and effect of Amendment 73 "are to disqualify congressional incumbents from further service" by superimposing "[a]n additional qualification" atop the ones already specified in Article I: *viz.*, "prior service." *Id.* at 15a. The plurality acknowledged that the Amendment does not "totally disqualif[y]" incumbents from becoming officeholders, since an incumbent can run as a write-in candidate for such an office. *Id.* But "[t]hese glimmers of opportunity" were, according to the plurality's view, too "faint" to "salvage Amendment 73 from constitutional attack." *Id.* Finally, because Amendment 73 violated the Qualifications Clauses, the plurality determined that the Amendment could not be upheld under the power reserved to the States by the Tenth Amendment. *Id.*

In separate opinions, Justices Dudley and Brown concurred in the ruling that Amendment 73 violates the Qualifications Clauses. Pet. App. 26a-27a, 41a-42a. Justice

Dudley stated that Amendment 73 is unconstitutional because the Framers rejected term limits for Representatives and Senators when drafting the Constitution and because allowing States to impose additional qualifications beyond the ones specified in Article I "is antithetical to republican values." *Id.* at 26a. He acknowledged that whether the ballot access limitations imposed by Amendment 73 are constitutional "is a close question and difficult issue," *id.*, but he ultimately found the limitations invalid under Article I, because "as a practical matter, write-in candidates are at a distinct disadvantage" in an election, *id.* at 27a. Justice Brown also noted that "the issue is not entirely free from doubt," but, he, too, ultimately concluded that the Framers had considered and rejected term limits for legislative offices when drafting Article I. *Id.* at 41a. The advantages of having uniform, nationwide qualifications for federal offices, he added, fortified his conclusion. *Id.* at 41a-42a.⁴

b. Justices Hays and Cracraft dissented. Pet. App. 33a-35a, 37a-39a. According to Justice Hays, the Tenth Amendment guarantees States the right to structure their own forms of government and, in so doing, to set qualifications for candidates to state or federal offices as long as those requirements do not violate the Qualifications Clauses. Since those Clauses fix only "the *minimum* requirements rather than the *exclusive* requirements," *id.* at 34a, States may add additional qualifications under state law, *id.* at 34a-35a. Justice Cracraft determined that the ballot access restrictions set by Amendment 73 are not "qualifications" for purposes of Article I, because they do not bar an elected candidate from holding office

⁴ The Arkansas Supreme Court did not address the question whether, as applied to federal office, Amendment 73 violates Article IV of the Constitution or the First and Fourteenth Amendments. That court did address whether the term limits imposed on state officials violated the First or Fourteenth Amendments, and held that they do not.

if he receives the majority of votes cast. *Id.* at 37a. Relying on *Hopfmann v. Connolly*, 746 F.2d 97 (1st Cir. 1984), vacated in part on other grounds, 471 U.S. 459, reaffirmed on remand, 769 F.2d 24, 25 n.1 (1985), cert. denied, 479 U.S. 1023 (1987), and *Joyner v. Mofford*, 706 F.2d 1523 (9th Cir.), cert. denied, 464 U.S. 1002 (1983), Justice Cracraft stated that "the test to determine whether or not the restriction amounts to a qualification within the meaning of Article I, Section 3, is whether the candidate could be elected if his name were written in by a sufficient number of electors." Pet. App. 38a (internal punctuation omitted). Amendment 73 passed that test, he determined, since "[u]nder our liberal write-in laws, an incumbent can be elected to congressional office and, if elected, serve the term for which elected." *Id.* at 37a.

SUMMARY OF ARGUMENT

I. States have broad power under Article I and the Tenth Amendment to regulate federal elections, and they have exercised that power throughout our history. For example, States have imposed district residency requirements on Representatives and have required federal officials to be qualified voters, which excludes felons and the mentally incompetent. Term limits and ballot access laws are also legitimate, historically-based, judicially-approved regulations that are designed to even the playing field between incumbents and challengers, and ultimately to enhance the responsiveness of delegates.

II. States can regulate the voting process, even if such regulations may exclude some candidates from office. Amendment 73 excludes long-term incumbents from the ballot, but still permits them to be elected via write-in votes. The amendment thus is a reasonable regulation of ballot access, since it does not disqualify an incumbent from holding office as a matter of law.

III. States can impose qualifications on federal office atop the ones listed in Article I. The Qualifications Clauses deny certain persons the right to hold federal elected office; the Clauses do not guarantee anyone the right to campaign for such office. The text of Article I and its drafting history show that the Qualifications Clauses are not exclusive. *Powell* also does not control this case. *Powell* held only that each House cannot add new qualifications to Article I, not that the States are barred from doing so.

ARGUMENT

AMENDMENT 73 TO THE ARKANSAS CONSTITUTION IS A LAWFUL EXERCISE OF STATE AUTHORITY OVER THE ELECTORAL PROCESS

The Arkansas Supreme Court held Amendment 73 unconstitutional by focusing on the Qualifications Clauses without considering the Elections Clause or Tenth Amendment. That approach was mistaken. The Constitution contains numerous provisions establishing the electoral process, and the entire fabric of law must be read as a whole. *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). Those provisions make clear that, as explained in Point I, just as States can regulate elections for state office, *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2400-03 (1991), so, too, can States regulate federal elections. Term limits and ballot access restrictions are a legitimate exercise of that authority. Moreover, as explained in Point II, States can regulate access to the ballot even if doing so excludes some candidates from office. *Storer v. Brown*, 415 U.S. 724, 728-37, 746 n.16 (1974). Amendment 73 is best viewed as a permissible ballot access regulation and should be upheld for that reason. Finally, even if Amendment 73 is deemed to impose qualifications on office, States can impose qualifications for federal office in addition to the ones listed in Article I, as explained in Point III. The judgment of the Arkansas Supreme Court should therefore be reversed.

I. STATES HAVE BROAD POWER UNDER THE ELECTIONS CLAUSE AND THE TENTH AMENDMENT TO REGULATE FEDERAL ELECTIONS

A. States Have The Power To Regulate The Electoral Process For State And Federal Officials

1. *States have the inherent power to regulate state elections*

Throughout our history, the States have exercised their authority to regulate their own electoral processes; none has left elections to the free market. Regulation of the electoral process began during the colonial and revolutionary periods, App. B, *infra*, and continues today. All 50 States have constitutional or statutory eligibility prerequisites for state office. For example, 41 States have minimum age or residency requirements for governor or state legislator. Other typical restrictions are the exclusion of convicted felons from eligibility, *e.g.*, Ark. Const. Art. 19 § 3; *id.* Amend. 51, § 11(4), and limitations on the eligibility of civil servants for elected office, such as so-called "resign to run" laws.⁵ Other common regulations include

⁵ The ban in this nation on felons holding office reaches back to at least 1661, when the Governor of Maryland ordered local sheriffs to restrain felons from holding office. Albert Edward McKinley, *The Suffrage Franchise in the Thirteen English Colonies in America* 60 (1905); see 1 Charles Seymour & Donald Paige Frary, *How the World Votes* 234 (1918). Today, 37 States bar at least some convicted felons from holding or seeking office for the period of their imprisonment or disability, or for some period thereafter. *Developments in the Law: Elections*, 88 Harv. L. Rev. 1111, 1218-19 n.9 (1975); Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 Vanderbilt L. Rev. 929, 987-997 (1970); see, *e.g.*, Cal. Penal Code § 424 (Deering 1985); Ga. Const. of 1976, art. 2, § 2, ¶ III (1990); Haw. Rev. Stat. § 19-4 (1985); Kan. Stat. Ann. § 21-3901(b) (Supp. 1993); Pa. Const. art. 2, § 7; Mich. Comp. Laws. § 3350 (1929); Miss. Code § 2907 (1993); Mont. Const. art. IV, § 4; N.C. Const. art. VI, § 8; N.H. Rev. Stat. Ann. § 607-A:2 (1955); N.M. Const. art. VII, § 2; Va. Const. art. II, §§ 1, 5. Those states generally disenfranchise convicted felons. See, *e.g.*, Kan. Const. art. V, § 2; Va. Const. art. II, § 1; *Richardson*

campaign contribution reporting and disclosure requirements, or contribution and expenditure limitations. See *Developments in the Law: Elections*, 88 Harv. L. Rev. 1111, 1217, 1223-30 (1975).

Arkansas regulates its electoral process comprehensively. The election code regulates the duties and powers of political parties, including the primary process and use of party loyalty oaths, 6A Ark. Code Ann. §§ 7-3-101 to 7-3-108 (Michie 1993); it establishes the composition, powers and responsibilities of state and county boards of election commissioners, *id.* §§ 7-4-101 to 108, 7-4-201 to 211, and 7-5-101; and it governs every aspect of the electoral process, such as voting qualifications; voter registration; the time and conduct of primaries, as well as general and special elections; the use and form of secret, write-in, and absentee ballots and voting machines; the calculation of election returns; and the circumstances requiring a runoff, *e.g.*, Ark Const. Amend. 50, §§ 1-4; *id.* Amend. 51, §§ 1-20; 6A Ark. Code Ann. tit. 7, ch. 5-8 (Michie 1993). And Arkansas election law defines various felonies and misdemeanors, such as casting more than one vote per election or using public facilities for campaign purposes, that disqualify a person from holding state office. *Id.* §§ 7-1-103 and 7-1-104.

2. States also have the power to regulate federal elections

The Constitution established "a system of dual sovereignty between the States and the Federal Government." *Gregory*, 111 S. Ct. at 2399. The process of electing federal officers reflects that division. Although the Constitution created the House of Representatives, the Sen-

v. Ramirez, 418 U.S. 24 (1974) (upholding Cal. Const. art. II, § 2 (1976), as amended, Cal. Const. art. 2, § 4, which disenfranchises ex-felons). Numerous states also have so-called resign-to-run laws, which require a state officeholder to resign that position in order to run for another state or a federal office. *E.g.*, *Clements v. Fashing*, 457 U.S. 957 (1982) (upholding Texas resign-to-run law).

ate, and the Presidency, it "submitted the regulation of elections for the federal government, in the first instance, to the local administrations." *The Federalist* No. 59, at 362-63 (A. Hamilton) (C. Rossiter ed. 1961). We have local elections for national office. Representatives are chosen by electors in each State qualified to vote for the most numerous branch of the state legislature. Art. I, § 2, Cl. 2. Senators originally were chosen by the legislature of each State, Art. I, § 3, Cl. 1, now by citizens, Amend. XVII. And the President is chosen by the Electoral College, whose members are appointed by state legislatures. Art. II, § 1, Cl. 1-2; Amend. XII.

Other sections of the Constitution expressly authorize the States to regulate federal elections or implicitly recognize that States have that power, just as they have inherent power to regulate elections for state officers, see *Burdick v. Takushi*, 112 S. Ct. 2059, 2063-64 (1992); *Gregory*, 111 S. Ct. at 2400-03; cf. *Coyle v. Smith*, 221 U.S. 559 (1911).⁶ For instance, the Electors Clause, Art. I, § 2, Cl. 1, rests on the premise that the States can set voting qualifications, since it ties voting qualifications for the House of Representatives to whatever qualifications a State uses for the most numerous branch of its own legislature. This Court also has made clear that, although the Constitution forbids a State from denying a citizen the right to vote due to race, sex, age, or other arbitrary bases, Amends. XIV, XV, XIX, and XXVI,⁷ a State has the power under Art. I, § 2, Cl. 1, to define voting qualifica-

⁶ See also *The Federalist* No. 4, at 292-93 (J. Madison) (C. Rossiter ed. 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."); James Wilson's Speech at a Public Meeting (Oct. 6, 1787), reprinted in 1 *The Debate on the Constitution* 64 (Bernard Bailyn ed. 1993) (hereinafter *Debate*) ("every thing which is not given, is reserved").

⁷ See, *e.g.*, *Guinn v. United States*, 238 U.S. 347 (1915); *Carlington v. Rash*, 380 U.S. 89 (1965); *Quinn v. Millsap*, 491 U.S. 95 (1989).

tions.⁸ Moreover, the Elections Clause of the Constitution, Art. I, § 4, Cl. 1, authorizes state legislatures to define the "Times, Places, and Manner" of electing Representatives and Senators. That provision ensures that "[t]he members and officers of the State governments * * * will have an essential agency in giving effect to the federal Constitution." *The Federalist* No. 44, at 287 (J. Madison); see *Carroll v. Becker*, 285 U.S. 380 (1932); *Koenig v. Flynn*, 285 U.S. 375 (1932); *Smiley v. Holm*, 285 U.S. 355 (1932); *Hawke v. Smith (No. 1)*, 253 U.S. 221 (1920).

The power granted States by the Elections Clause includes more than the ability to select the location of polling booths or to tally votes. It is a "comprehensive" delegation of power "to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns[.]" *Smiley v. Holm*, 285 U.S. at 366; *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986); *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972). This Court has held consistently that States have power under that Clause to regulate federal elections in order to protect, for example, the integrity of the process and prevent voter confusion. See, e.g., *Burdick*, 112 S. Ct. at 2063-67.⁹

⁸ See, e.g., *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874); *The Ku-Klux Cases (Ex parte Yarbrough)*, 110 U.S. 651, 663 (1884); *Davis v. Beason*, 133 U.S. 333, 346-47 (1890); *McPherson v. Blacker*, 146 U.S. 1, 38-39 (1892); *Williams v. Mississippi*, 170 U.S. 213, 222-25 (1898); *Mason v. Missouri*, 179 U.S. 328, 335 (1900); *Pope v. Williams*, 193 U.S. 621, 632 (1904); *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937); *Lassiter v. Northhampton County Bd. of Elections*, 360 U.S. 45, 50-51 (1959); cf. *Murphy v. Ramsey*, 114 U.S. 15, 43-45 (1885) (Congress has the same power in the territories).

⁹ See also, e.g., *Burson v. Freeman*, 112 S. Ct. 1846, 1852 (1992); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660

States historically have exercised that power. From before 1787 until today, States have overseen federal elections. As this Court explained in *Storer*, "States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates." 415 U.S. at 730.

States exercised their Elections Clause power shortly after the Constitution became law.¹⁰ Some imposed additional qualifications on members of Congress atop those listed in the Qualifications Clauses. Virginia added property and residency requirements.¹¹ Georgia, Maryland,

(1990); *Tashjian*, 479 U.S. at 217; *Eu v. San Francisco Democratic Comm'n*, 489 U.S. 214, 231 (1989); *Storer v. Brown*, 415 U.S. at 728-37; *Bullock v. Carter*, 405 U.S. 134, 143, 145 (1972); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *Oregon v. Mitchell*, 400 U.S. 112, 288 (1970) (opinion of Stewart, J.).

¹⁰ The debates over Art. I, § 4, Cl. 1, reveal that the States thought that they retained significant control over selection of candidates. The debate in the North Carolina ratifying convention, for example, underscores the fear that Congress would exercise its Section 4 power to override state election laws. 2 *Debate* 854-60. Several states, including Massachusetts, New Hampshire, Maryland, and North Carolina, proposed amendments limiting Congress's power to override state election laws. 2 *id.* 548, 551, 554, 573. Proponents of the Constitution assured those who objected to Section 4 that Congress would not deprive States of control absent insurrection or failure to send a representative to Congress. 1 *id.* 428-29; 2 *id.* 751. Ironically, one detractor believed that Congress would pass laws enabling them to "hold their seats as long as they live, and there is no authority to dispossess them." 2 *id.* 813.

¹¹ Va. Act of Nov. 20, 1788, ch. 2, § II. Virginia's eligibility requirements for congressional candidates certainly were not unknown to the Framers. In the election of 1789, James Madison defeated James Monroe in one of Virginia's ten congressional districts. There is no indication that Madison objected to Virginia's presumed authority to impose its own restrictions on candidates for Congress.

Massachusetts, and North Carolina required a Representative to reside in his district.¹² New Jersey adopted a nominating process as a prerequisite for office.¹³ Pennsylvania imposed a rotation requirement on its delegates to Congress in the first federal elections, held in 1788.¹⁴ Furthermore, States were free to elect representatives on either a statewide or district basis until 1842, when Congress, first exercising its Elections Clause power, required House elections to be held by district, not at-large. 5 Stat. 491 (codified at 2 U.S.C. § 2(c) (1988)); *The Ku-Klux Cases (Ex parte Yarbrough)*, 110 U.S. 651, 660-61 (1884).¹⁵ Those restrictions were consistent with

¹² Ga. Act of Jan. 23, 1789, p. 247; Md. Act of Dec. 22, 1788, ch. 10 § VII; Mass. Res. of Nov. 19, 1788, ch. 49; N.C. Act of Dec. 16, 1789, ch. 1, § I. Tennessee was admitted to the union in 1796, and it, too, had a district residency requirement. Tenn. Act of Aug. 3, 1796, ch. 1, § 2.

¹³ N.J. Act of Nov. 21, 1788, ch. 241, § 3.

¹⁴ Pa. Const. of 1776, § 11, reprinted in 5 *Federal and State Constitutions* 3085 (Francis N. Thorpe ed. 1909) (reprinted 1993) (hereinafter *Thorpe*); see also 1 *The Documentary History of the First Federal Elections, 1788-1790* (Gordon DenBoer and Merrill Jensen eds. 1984) 229-30 (hereafter *Documentary History*). Pennsylvania deleted that requirement for its elected officials in the 1790 state constitution, but the State believed that its original rotation provision did not violate Article I.

¹⁵ Unlike the Arkansas Supreme Court, the Framers were not troubled by disuniformity in how the States chose Representatives. James Madison believed that the States had the power to elect representatives by district or at-large, and that that freedom was valuable. In an October 1788 letter to Thomas Jefferson written immediately before the first elections to Congress under the new Constitution, Madison commented that some States would elect Representatives at large while others, including Virginia, would create congressional districts. Nothing in Madison's letter even suggests that the Qualifications Clauses controlled the "various modes" adopted by the States for electing candidates to the House. Madison told Jefferson: "A law has passed [in Pennsylvania] providing for the election of members for the House of Representatives and of Electors of the President. The act proposes that every citizen throughout the state shall vote for the whole number of members allotted to the state. This mode of election will confine the choice to characters of general notoriety, and so far be favorable to merit. It is however liable to some popular objections urged

Thomas Jefferson's belief that the States retained power to establish additional qualifications. Jefferson wrote that Article I imposed "some" disqualifications, "[b]ut it does not declare, itself, that the member shall not be a lunatic, a pauper, a convict of treason, of murder, of felony, or other infamous crime, or a non-resident of his district; nor does it prohibit to the State the power of declaring these or any other disqualifications which its particular circumstances call for; and these may be different in different States. Of course, then, by the tenth amendment, the power is reserved to the States." 2 *The Founders' Constitution* 81 (Philip Kurland & Ralph Lerner eds. 1987) (quoting 11 *The Works of Thomas Jefferson* 380 (P. Ford ed. 1905)).¹⁶

The States have carried forward such regulations to the present. Some states require that candidates for Congress

against the tendency of the new system. In Virginia, I am inclined to think the state will be divided into as many districts as there are to be members. In other states, as in Connecticut, the Pennsylvania example will probably be followed; and in others again a middle course be taken * * *. It is perhaps to be desired that various modes should be tried, as by that means only the best mode can be ascertained." 1 *Documentary History* 303 (emphasis added).

After passage of the 1842 law, four States—Georgia, Mississippi, Missouri, and New Hampshire—still elected Representatives on an at-large basis. The 28th Congress seated the delegates, nonetheless, even though their States had willfully violated the 1842 law. Chester H. Rowell, *A Historical and Legal Digest of All the Contested Election Cases in the House of Representatives of the United States, 1789-1901*, at 117-20 (1901).

¹⁶ State legislatures exercised direct control over Senators by electing them, and indirect control through the historic process of "instruction," viz., informing them how to vote on issues. Instruction served as a mechanism by which the state legislatures informed their Senators (and to some, like John Randolph of Virginia, Representatives too) how to vote on issues. This practice was widespread in the colonial and revolutionary periods. William E. Dodd, *The Principle of Instructing United States Senators*, 1 *South Atlantic Q.* 326 (Jan.-Oct. 1902); James K. Coyne & John H. Fund, *Cleaning House* 179-80 (1992); 2 George S. Haynes, *The Senate of the United States* 1025-34 (1960); Roy Swanstrom, *The United States Senate 1787-1801*, S. Doc. No. 100-31, 100th Cong., 1st Sess. 159-72 (1988).

qualify as "electors," *i.e.*, voters.¹⁷ Many States require that electors must be state residents (although the length of the residency period varies).¹⁸ States require candidates to submit petitions with a specific number or percent of signatures by local registered voters in order to appear on the ballot.¹⁹ Some States require congressional candidates in primary elections to show allegiance to (or independence from) a political party.²⁰ Other States prohibit candidates from running in the general election if they have lost in a primary.²¹ And many States forbid candidates for Congress from holding state office or seats on state courts or from running for two seats concurrently.²² According to a compilation prepared by the Fed-

¹⁷ *E.g.*, Ill. Ann. Stat. Ch. 5, Para. 7-10 (1993); Iowa Code Ann. § 43.18 (West 1991); Mo. Ann. Stat. § 115.349 (1993); N.C. Const. art. VI § 6, R.I. Const. art. 3, § 1. But cf. *Danielson v. Fitzsimmons*, 232 Minn. 149, 44 N.W.2d 484 (1950) (convicted felon can qualify for federal office notwithstanding state constitutional provision to the contrary).

¹⁸ *E.g.*, Del. Code Ann. tit. 15, § 4101 (1981); Idaho Code § 34-604 (Supp. 1991); Minn. Stat. Ann. § 204B.06(c) (Supp. 1990-1991); N.H. Rev. Stat. Ann. § 655:2 (1986); Va. Code Ann. § 5 (Michie 1985).

¹⁹ *E.g.*, Ala. Code § 17-7-1(a)(3) (Supp. 1993); Cal. Elec. Code §§ 6831 & 6838 (West Supp. 1993); Fla. Stat. Ann. § 99.096 (1982); Iowa Code Ann. § 43.20 (West Supp. 1992); Ky. Rev. Stat. Ann. § 118.315(2) (1993); N.Y. Elec. Law § 6-142 (McKinney Supp. 1993).

²⁰ *E.g.*, Colo. Rev. Stat. § 1-4-601(4) (Supp. 1993); Del. Code Ann. tit. 15, § 3002(b) (Supp. 1990); Haw. Rev. Stat. § 12-3 (Supp. 1991); Iowa Code Ann. §§ 43.18 & 49.39 (West 1991); Mich. Comp. Laws Ann. § 6.1692-1693 (1993); N.C. Gen. Stat. § 163-106 (1991).

²¹ *E.g.*, 6A Ark. Code Ann. § 7-7-103(f) (Michie Supp. 1993); Colo. Rev. Stat. § 1-4-105 (Supp. 1993); Ill. Stat., ch. 10, § 5/10-2 (1993); Kan. Stat. Ann. §§ 25-205, 25-202(c) (Supp. 1992); Md. Code Ann. Elec. § 8-2 (Supp. 1991); Neb. Rev. Stat. § 32-516 (1993); N.H. Rev. Stat. Ann. § 659:91-a (Supp. 1992); N.D. Cent. Code § 16.1-13-06 (1992); S.C. Code Ann. § 7-11-210 (Supp. 1992); Tenn. Code § 2-5-101(f) (1993).

²² *E.g.*, Alaska Const. art. IV, § 14; Ariz. Rev. Stat. Ann. § 38-296(A) (Supp. 1990-1991); La. Rev. Stat. Ann. tit. 18, § 453A (Supp. 1993); Me. Rev. Stat. Ann. tit. 21-A, § 351 (1993).

eral Election Commission, state laws governing congressional elections "are enormously complex. They vary, for example, by state, by type of election, by type of federal office, by type of party or candidate, and by type of criteria and procedure."²³

Arkansas also regulates the election of its delegation to Congress. State law defines the boundaries of congressional districts, and redistricting is done, in the first instance, by the state legislature. 6A Ark. Code Ann. §§ 7-1-101 to 7-2-105 (Michie 1993). Candidates for Congress must possess the qualifications of registered voters as defined by state law, which means that felons and the mentally incompetent cannot run for federal office. Ark. Const. Art. 19, § 3; *id.* Amend. 51, § 11(4). Anyone defeated in a party primary cannot run as an independent candidate at the general election. 6A Ark. Code Ann. § 7-7-103(f) (Michie 1993).²⁴ No one appointed

²³ 2 Federal Election Comm'n, *Ballot Access: For Congressional Candidates* (1988); see also *Senate Election Law Guidebook* 1992, S. Doc. No. 15, 102d Cong., 2d Sess. (1992). Moreover, no one suggests that redistricting and reapportionment by states, for example, violates the Qualifications Clauses, yet this is a broad power through which states determine the selection of their representatives.

²⁴ There are two methods for a candidate to have his or her name printed on the ballot in Arkansas: by party nomination or as an independent candidate. A candidate seeking party nomination for Congress must pay the filing fee; retain a receipt for fee paid; and at party headquarters complete an affidavit of eligibility, a party loyalty pledge (if one is required), and any necessary party requirements. The state party then issues an acknowledgement that the candidate has completed all party requirements. A congressional candidate also must file various Federal Election Commission forms. 6A Ark. Code Ann. § 7-7-301 (Michie 1993). The candidate must file a receipt, the state party acknowledgement, and a political practice pledge with the Secretary of State. *Id.* § 7-7-301(c) and § 7-6-102(a)(1). For an independent candidate to have his or her name printed on the ballot for United States Senator, the candidate must file petitions signed by not less than 3% of the qualified state electors or containing 10,000 signatures, whichever is less. For a House race, an independent candidate must file petitions signed by not less than 3% of the qualified electors in the congressional district, or with no more than 2,000 signatures. Each elector signing the

by the Governor to fill a Senate vacancy is eligible to succeed himself; spouses and relatives within the fourth degree of consanguinity or affinity to the Governor also cannot be appointed to fill Senate vacancies. Ark. Const. Amend. 29, § 2 (1983). Those laws regulate the procedure and substance of federal elections.²⁵

B. Term Limits And Ballot Access Restrictions Are Reasonable Regulations Of The Electoral Process

1. The Founding Fathers envisioned that elected officials would serve in the image of the Roman hero Cincinnatus, who left his plow to raise an army, defended Rome, and once again became a common citizen. The Framers envisioned Congress as consisting of "citizen legislators," in Roger Sherman's words, who would "return home and mix with the people," rather than remaining in office perpetually. James K. Coyne & John H. Fund, *Cleaning House* 112 (1992). Indeed, the members of the Constitu-

petition must be a registered voter. The petitions can be circulated for signatures not earlier than 60 days before the deadline for filing petitions to qualify as an independent candidate (the date of the deadline for filing political practices pledges and party pledges, or May 1, whichever is later). Anyone defeated in a party primary cannot run as an independent candidate in the general election for the office for which he or she was defeated in the primary. The signature petitions are verified by the Secretary of State's office and if there is a sufficient number of qualified signatures, the Secretary of State will certify the independent candidate's name to be printed on the ballot. *Id.* § 7-7-103(c).

²⁵ The ruling below could prevent Arkansas from enforcing those other laws. In fact, a lawsuit seeking such relief already has been filed in state court. *Hamilton v. McCuen*, No. 94-1475 (Pulaski Cnty. Chancery Ct. filed Mar. 11, 1994). That argument—that a myriad of state election laws are called into question by the Arkansas Supreme Court's ruling—was foreshadowed more than 100 years ago in Congress. In a 19th century contested election in Congress, the case of *Woods v. Peters*, Representative Bennett authored a minority report of the House Committee on Elections which catalogued the then-known state election laws that would be called into question if the Qualifications Clauses were deemed exclusive. William H. Mobley, *Digest of Contested Election Cases Arising in the Forty-Eighth, Forty-Ninth, and Fiftieth Congresses* 88-99 (1889) (Report of Mr. Bennett); App. C, *infra*.

tional Convention selected two-year terms for Representatives in order to allow them ample time to master the duties of their offices, yet prevent them from losing what James Madison called "an intimate sympathy with the people." *The Federalist* No. 52, at 327.

During the 18th and 19th centuries, voluntary rotation of office was a common tradition. Officials ordinarily served no more than two terms in the House and one in the Senate; during the Civil War era, less than 2% of Representatives served for more than 12 years. One-third of incumbents would not seek re-election, and turnover in an average election was 40-50% of Congress. American Enterprise Inst., *Limiting Presidential and Congressional Terms* 8 (1979) (AEI); James K. Coyne & John H. Fund, *supra*, at 88, 112-13; Mark P. Petracca, *The Poison of Professional Politics*, Policy Analysis, No. 151, at 4 (Cato Inst. May 10, 1991); Sula P. Richardson, *Congressional Tenure: A Review of Efforts to Limit House and Senate Service* 4-5 (CRS Report Sept. 13, 1989).

This century has witnessed a dramatic surge in the number of long-term incumbents. Over the past 60 years, no fewer than 79% of incumbent Representatives seeking reelection have been successful. In only two of those elections, 1938 and 1948, was the incumbents' re-election rate below 80%. In the past three congressional elections, 98%, 96%, and 88% of the incumbents in the House of Representatives who sought re-election won. Moreover, at least 90% of all incumbents seeking re-election were retained in every congressional election from 1974 to 1990.²⁶ As the result, over time the number of members

²⁶ See, e.g., James K. Coyne & John H. Fund, *supra*, at 46; George F. Will, *Restoration* 77 (1992); Robert C. DeCarli, Note, *The Constitutionality of State-Enacted Term Limits Under the Qualifications Clauses*, 71 Tex. L. Rev. 865, 866 n.7 (1993); Troy A. Eid & Jim Koble, *The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office*, 69 Denv. U. L. Rev. 1, 3 (1992). 93% of Representatives with 20 or more years of service and 95% of those with 30 or more years of service were elected after 1900. Sula P. Richardson, *supra*, at 5 n.14.

spending 12 or more years in the House of Representatives has jumped from less than 20 at the turn of the century to nearly 200 today, and nearly half of the Senators now remain in office for 12 or more years.²⁷ See App. I, *infra*. In fact, some observers have concluded that, as a practical matter, incumbents are likely to be unseated only by reapportionment or scandal.²⁸

Arkansas typifies that scenario. Not until 1878, 40 years after statehood, did an Arkansas Representative serve more than three terms. Before the Civil War, 41% of incumbent Representatives did not seek re-election. By contrast, from 1944 to 1966 Arkansas had the same four Representatives. From 1967 to 1992, only 15% of House incumbents did not seek re-election, and during that period 88% of all incumbents seeking re-election were returned to office. From 1942 to 1974, Arkansas had the same two senators. Since the direct election of Senators began, incumbents have won 20 of 22 primaries (91%); no incumbent has ever lost a general election; and in four of 22 races incumbents ran unopposed in the primary and general elections.²⁹

²⁷ George F. Will, *supra*, at 73-89. Commentators have also criticized related developments: Legislative staffs grew from 4,000 to 37,000 in the last 30 years, and have increased fourfold between 1960 and 1980. In April 1991, there were 37,388 staff in Congress. The number of registered lobbyists doubled between 1975 and 1985. In 1976, there were 1,146 registered political action committees that contributed \$22.6 million to House and Senate candidates; a decade later there were 4,211 registered PACs that contributed \$139.4 million to House and Senate candidates. James K. Coyne, *Term Limitation: Bringing Change, Competition, Control and Challengers to Congress* 3 (Apr. 19, 1991); Mark P. Petracca, *supra*, at 3. Virtually all PAC contributions go to incumbents. Illustrative charts are in App. I, *infra*.

²⁸ Sula P. Richardson, *Congressional Tenure: A Review of Efforts to Limit House and Senate Service* 4-5 (CRS Report Sept. 13, 1989); see James K. Coyne & John H. Fund, *supra*, at 117.

²⁹ The above Arkansas statistics can be found in the records of the Office of the Arkansas Secretary of State and in *Biographical Directory of the United States Congress, 1774-1989* (U.S. Gov't Printing Office 1989).

The upshot is this: The Framers' ideal of "citizen-legislators"—individuals temporarily serving the nation in government before returning to private life—has been eclipsed by the cynical (and corrosive) belief that elected officials often are simply entrenched career politicians more interested in permanently maintaining their sinecures than in representing the people. To remedy that problem, numerous States already have adopted or are considering reuse of an historical electoral practice to enhance rotation in office.

2. Term limits have an ancient pedigree.³⁰ Term limits were widespread during the colonial and revolutionary periods. For example, the Constitution of Virginia of 1776 expressly endorsed rotation as a valuable principle.³¹ The Pennsylvania Constitution of 1776 set a four-year limit on the legislature. Ten of the 13 new States imposed term limits upon their state executives, legislators, or delegates to Congress. App. B, *infra*. The Articles of Confederation established a unicameral legislature with delegates appointed annually by state legislatures. Arts. of Confederation Art. V. The delegates to the First and Second Continental Congresses were chosen without any term of office; they could serve only three years in a six-year period; and they could be recalled at any time. The limitation sought to prevent officeholders from becoming "a perpetual 'ruling class' of legislators who might thus

³⁰ The principle that term limits promote valuable rotation in office traces its lineage to Athens and Rome. James K. Coyne & John H. Fund, *supra*, at 110.

³¹ Section 5 provided that "the legislative and executive powers of the State should be separate and distinct from the judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct." Va. Const. of 1776, pt. 1, § 5, reprinted in 7 Thorpe 3812, 3813.

become unresponsive to their constituents' needs." Sula P. Richardson, *supra*, at 2; Charles O. Jones, *Every Second Year* 2-3 (1967); James K. Coyne & John H. Fund, *supra*, at 111.

The Virginia Plan for a new Constitution, drafted by James Madison and introduced by Edmund Randolph of Virginia, initially provided that members of the House and Senate would be "incapable of reelection" for an unspecified period of time "after the expiration of their terms of service." 1 *Records of the Federal Convention of 1787*, at 20 (M. Farrand ed. 1987) (hereafter *Farrand*). Nonetheless, the Constitutional Convention of 1787 principally debated the length of terms for the House and Senate, rather than the length of service for individual officeholders. Although there is no recorded debate on the issue, the Committee of the Whole decided against including term limits because they "enter[ed] too much into detail for general propositions." 1 *id.* at 50-51. Some parties criticized the Constitution for not requiring rotation, but supporters defended the absence of term limits on the ground that the specified terms of office and the need for Representatives to be re-elected biennially ensured turnover. See, e.g., 1 *The Debate on the Constitution* 111, 325-26, 367-68, 401-02 (Bernard Bailyn ed. 1993); 2 *id.* 891-93, 902.

Similar mandatory rotation proposals were advanced shortly after the First Congress convened. None, however, became law.³² Although the principle of rotation in office never lost currency, the idea of imposing legal term limits on Members of Congress fell into desuetude for the

³² On August 18, 1789, South Carolina Representative Thomas Tucker introduced proposals to limit service in the House and the Senate. 1 *Annals of Congress* 762 (Joseph Gales ed. 1789). One proposal would have limited a Representative to six successive years in an eight-year period. The other one would have limited a Senator's term to one year, with a cap of five consecutive years of service during a six-year period. The House did not vote on either proposal. Sula P. Richardson, *supra*, at 4.

ensuing 150 years, perhaps due to the precedent set by Washington and Jefferson of serving only two terms as President and the high rates of voluntary legislative rotation seen in that era. Mark P. Petracca, *supra*, at 14; Sula P. Richardson, *supra*, at 4-6.³³

The same period witnessed a two-fold increase in the average tenure of House service, from four to eight years, as a number of interrelated factors made longer congressional service more attractive. Congress established standing committees. The congressional seniority system, which evolved by internal customs and political party rules, determined which members sat on and chaired committees, thereby enhancing the value of longevity in office. Lengthy tenure replaced expertise as the source of congressional influence. The federal government gradually assumed an increasingly powerful role in setting policy for the nation. Together, those factors eventually helped give rise to career congressmen. Sula P. Richardson, *supra*, at 5. And that development has been characterized as perhaps the most significant event in modern-day politics. See, e.g., George F. Will, *Restoration* (1992).

Recent history shows that officials are unlikely voluntarily to relinquish office unless it is to seek another position. Members of Congress have developed an institutional interest in prolonging their own tenure. Also, it is no answer that voters can select other representatives. The seniority system bestows considerable benefits on senior incumbents, so it is unreasonable to expect individual voters to handicap themselves by turning out their own officials without some expectation that every other group vying for its share of the public fisc will occupy the same

³³ Only once has there been a recorded vote in Congress on term limits for the House or Senate. During the debate on the Twenty-Sixth Amendment, which limited the President to two full terms, Senator O'Daniel offered an amendment that would have limited Members of Congress to six years in office. The Senate defeated the amendment 82-1, with only Senator O'Daniel voting in its favor. 93 Cong. Rec. 1962-63 (1947).

position. To be sure, while no State can force another to limit the terms of its officials, each State can ensure that its entire electorate is in the same position and can add to the number of States limiting Members' terms, thereby hoping over time incrementally to encourage Congress to equalize the conditions among the States by proposing a constitutional amendment under Article V or by passing legislation under Article I limiting Members' terms. Kris W. Kobach, Note, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 Yale L.J. 1971 (1994). Accordingly, just as the courts were the only agency in an institutional position to effect a rational constitutional solution to the problem of malapportionment, Thomas I. Emerson, *Malapportionment and Judicial Power*, 72 Yale L.J. 64, 79-80 (1962), so, too, term limits (or ballot access laws) are the only (or at least the most direct) institutional means of effecting a rational solution to the problem of entrenched incumbency.

The resurgent interest in rotation for federal officeholders fits into a settled fabric of state law imposing similar requirements on their state officers. Twenty States limit the terms of the governor or other executive officials. App. D, *infra*. Fourteen additional States (including Arkansas) impose term limits on the governor (and other executive officials) and legislators. Apps. E-F, *infra*. Only 12 States do not limit the terms or ballot access of officeholders in some manner. App. G, *infra*. Finally, more than 200 municipalities have term limits or incumbency-based ballot access restrictions for local officials. App. H, *infra*.

The States have not limited such reforms to their own offices. To remedy actual and perceived ills resulting from contemporary incumbency rates, Arkansas and 14 other States have established term limits or ballot access restrictions for federal elective office.³⁴ As a result, 153 Repre-

³⁴ See Ariz. Const. art. VII, § 18; Cal. Elec. Code § 25003 (Deering 1993); Colo. Const. art. XVIII, § 9a; Fla. Const. art. 6, § 4; Mich.

sentatives and 28 Senators are today subject to such laws, and other States are considering whether to adopt such measures. Present indications are that term limits and ballot access initiatives may appear on the ballot in a number of States this or next year.³⁵

Historic figures in American politics have endorsed the principle that frequent turnover of elected officials is a healthy feature of a vibrant democratic republic. John Adams, delegate to the Constitutional Convention, believed that rotation would "teach" men "the great political virtues of humility, patience, and moderation without which every man in power becomes a ravenous beast of prey." George F. Will, *supra*, at 110. Elbridge Gerry thought that "[r]otation keeps the mind of man in equilibria [*sic*] and teaches him the feelings of the governed' and counters 'the overbearing insolence of office.'" *Id.* George Mason and Andrew Jackson believed in the value of rotation. Thomas Jefferson was critical of the fact that the Constitution did not limit congressional terms.³⁶ Presidents Abraham Lincoln, Harry Truman, Dwight Eisenhower, John Kennedy, and George Bush favored term limits. James K.

Const. art. II, § 10; Mo. Const. art. III § 45(a); Mont. Const. art. IV, § 8; N.D. Cent. Code § 16.1-01-13.1 (1992); Ohio Const. art. V, § 8; Ore. Const. art. II, § 20; S.D. Const. art. III, § 32; Wash. Rev. Code § 29.68.015-.016 (West 1992); Wyo. Stat. § 22-5-104 (1992). The Nebraska law, Neb. Const. art. XV, § 20, was recently held invalid on state law grounds due to a defect in the initiative process. *Duggan v. Beermann*, 515 N.W.2d 788 (Neb. 1994). A district court held the Washington law unconstitutional on February 10, 1994. *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W. D. Wash. 1994), appeals pending *sub nom.* *Thorsted v. Munro*, Nos. 94-35222 et al. (9th Cir.).

³⁵ A NEXIS search indicated that the following states are considering new or additional term limits proposals: Alaska, Idaho, Illinois, Massachusetts, Maine, Nebraska, Oklahoma, Nevada, and Utah.

³⁶ Jefferson wrote Madison that "[t]he second feature I dislike, and greatly dislike, is the abandonment in every instance, of the necessity of rotation in office. . . ." Thomas Jefferson, Letter from Jefferson to Madison (Dec. 20, 1787), *reprinted in* 1 *Debate* 211.

Coyne & John H. Fund, *supra*, at 113, 159-64; James C. Otteson, 41 DePaul L. Rev. at 22-23; Mark P. Petracca, *supra*, at 21; Sula P. Richardson, *supra*, at 8-9.

3. Term limits further democratic principles in several ways: Their principal purpose is to help offset what are often described as the nearly insurmountable advantages of incumbency. Incumbents typically raise more funds than challengers, and incumbents can carry over unspent campaign funds from one election to the next. Incumbents have use of the franking privilege to distribute mass mailings, easier access to media coverage, as well as greater name recognition and visibility, particularly given the use of televised hearings and floor speeches. A member's televised hearings or floor speeches ideally provide already-produced television sound bites, while challengers must expend considerable sums for comparable ads. Long-term incumbents enjoy seniority, which enables them to bestow favors on constituents or local interest groups at public expense. Term limits are designed to "even out the playing field" and promote frequent rotation of elected officials in order to ensure that they are representative of, and responsive to, the public. See, e.g., George F. Will, *supra*, at 146-212; Mark P. Petracca, *supra*, at 15-20; James K. Coyne & John H. Fund, *supra*, at 113; Sula P. Richardson, *supra*, at 11-12; *Buckley v. Valeo*, 424 U.S. 1, 31 n.33 (1976); App. I, *infra*.

But term limits have been adopted for other reasons, too. Advocates of term limits believe that, by increasing turnover, term limits will increase the racial, gender, and career diversity of Members of Congress; that, by promoting a continuous influx of new Members, term limits will induce citizens to run for political office without committing themselves to a political career; that, by eliminating the possibility of becoming a career legislator, term limits will prompt Members to exercise their independent judgment in the public interest and reduce the time spent on fundraising, self-promotion, and "pork barrel" legislation; that, by preventing congressmen from developing

long-term relationships with the permanent bureaucracy, term limits will enhance skepticism and oversight of administrative programs; that, by substantially increasing the number of competitive congressional races, term limits are likely to increase voting rates; that, by "breaking up the 'ruling class' mentality that accompanies lifetime tenure in office," term limits more directly and precisely focus on problems of modern government than, say, spending limits or public campaign financing; that, by forcing political parties to seek new candidates, term limits will invigorate the role of political parties, rather than individual politicians; and that over time term limits will help purge the cynicism toward Congress plaguing today's electorate. In sum, as a remedy for the "depressing combination of legislative insularity, voter apathy, and special interest influence," Linda Cohen & Matthew Spitzer, *Term Limits*, 80 Geo. L.J. 477, 479 (1992) (footnote omitted), term limits are seen by the States that have adopted them as a necessary medicament to restore a healthy democracy. See, e.g., Ark. Const. Amend. 73 Preamble, *quoted at* pp. 3, 4a; George F. Will, *supra*, at 176-83, 212; AEI 21-22; James K. Coyne & John H. Fund, *supra*, at 117-40; James C. Otteson, *A Constitutional Analysis of Congressional Term Limits: Improving Representative Legislation Under the Constitution*, 41 DePaul L. Rev. 1, 13-18, 26-32 (1991).

II. STATES CAN RESTRICT ACCESS TO THE BALLOT FOR THE OFFICES OF REPRESENTATIVE AND SENATOR

A. States Have The Authority Under The Elections Clause And The Tenth Amendment To Impose Ballot Access Restrictions For The Offices Of Representative And Senator

The Constitution expressly provides that States may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." Art I, § 4, Cl. 1. This Court often has upheld the States' exercise of that authority as long as they do not rely on an arbitrary factor, effectively confer a monopoly on the two major

parties, or freeze the political status quo. See, e.g., *Burdick*, 112 S. Ct. at 2063-68. As a practical matter if elections are to be orderly, fair, and honest, rather than chaotic and biased, some regulation is essential. *Id.*

Every electoral regulation invariably imposes some burden on voters and candidates. Filing deadlines, party nomination or petition signature requirements, redistricting, etc., prevent some voters from electing the candidates of their choice in the interest of ensuring that elections are conducted responsibly and efficiently. The Framers evidently were willing to tolerate that effect, however, since they empowered the States to hold federal elections. The Court has recognized a need to accommodate the Elections and Qualifications Clauses, since *Storer* upheld a state regulation of federal elections despite its exclusionary effect. 415 U.S. at 728-37, 746 n.16. The issue, then, is how to distinguish a "regulation" from a "qualification."

The principal distinction between the two terms is that a "qualification," unlike a "regulation," is a prerequisite for (in this case) holding office. Then-contemporary dictionaries used that concept to define a "qualification."³⁷

³⁷ See, e.g., *American Dictionary of English Language* (1828) ("Any natural endowment or any acquirement which fits a person for a place, office or employment * * *; Legal power or requisite; as the *qualifications* of electors"); *Oxford English Dictionary* (1971) (definition from 1669) ("A quality, accomplishment, etc., which qualifies or fits a person for some office or function. * * * * A necessary condition, imposed by law or custom, which must be fulfilled or complied with before a certain right can be acquired or exercised, an office held, or the like"); John Ash, *The New and Complete Dictionary of the English Language* (1775) ("An accomplishment, that which makes fit; that which puts a man under the protection of the law in any office or profession"); Rev. John Davis, *Walker's Critical Pronouncing Dictionary and Expositor of the English Language* 442 (1828) ("That which makes any person or thing fit for any thing * * *"); Rev. Thomas Dyche, *A New General English Dictionary* (1777) ("something that enables or empowers a person to do that which otherwise he could not"); Samuel Johnson, *A Dictionary of the English Language* (1768) ("That which makes an person or thing fit for any thing"); William

Blackstone understood that "qualifications of persons to be elected members of the house of commons" meant criteria that entitle someone to hold that office. 1 W. Blackstone, *Commentaries*, reprinted in 2 *The Founders' Constitution* 68-69; see also 1 Joseph Story, *Commentaries on the Constitution* §§ 612-15 (1883), reprinted in 2 *The Founders' Constitution* 81-82. That interpretation is also the one that the Framers must have had in mind when drafting the Electors Clause, since the States had prerequisites to vote, such as freehold requirements. Construing the term "qualification" as a "prerequisite" is consistent with the use of that term in Art. I, § 5, Cl. 1, which authorizes each Chamber to "be the Judge of the Elections, Returns, and Qualifications of its Own Members"; each House can judge whether someone has satisfied the prerequisites for office. Finally, defining a "qualification" as a prerequisite for office leaves that term judicially manageable, whereas defining that concept by reference to some degree of difficulty does not. In sum, interpreting the term "qualification" as referring to a "prerequisite for holding office" is not only a sensible construction of that term, but also ensures that it has the same meaning throughout Article I.

So viewed, the term "qualification" does not embrace ballot access laws, like Amendment 73, that allow a candidate to be elected by a write-in vote. Such laws regulate only the manner by which votes are cast to obtain a majority, rather than the conditions that a person must satisfy to be sworn into office if that person garners a majority. Moreover, ballot access laws leave nothing for either Chamber to judge, since they regulate only the process of casting votes, instead of the attributes that candidates must possess to become elected officials.

Perry, *A General Dictionary of the English Language* (1795) ("an accomplishment; capacity, fitness"); Thomas Sheridan, *A General Dictionary of the English Language* (1784) ("that which makes an person or thing fit for any thing"); see also 2 John Bouvier, *Law Dictionary* 408 (1864) ("Having the requisite qualities for a thing; as, to be president of the United States, the candidate must possess certain qualifications.").

The Court's decision in *Storer v. Brown*, decided five years after *Powell*, supports the conclusion that ballot access laws like Amendment 73 do not violate the Qualifications Clauses. In *Storer*, the Court upheld a state law disqualifying from the ballot as an independent candidate for the House anyone who voted in the preceding primary or had been registered in a political party within one year prior to that primary. 415 U.S. at 728-37. Ineligible candidates challenged the law on the ground that their exclusion from the ballot was tantamount to imposition of an additional qualification for federal office, in violation of the Qualifications Clause. *Id.* at 727. In upholding the California law, the Court expressly rejected the candidates' Qualifications Clause challenge to the statute, holding that it no more imposed a "qualification" on federal office than a state law requiring a candidate, in order to garner a place on the ballot, to win a party primary or otherwise to establish substantial community support. *Id.* at 746 n.16. In fact, *Storer* found the argument "wholly without merit." *Id.* *Storer* thus establishes that a state law regulating a candidate's access to the ballot is not necessarily unconstitutional under the Qualifications Clauses, even if it has an exclusionary effect.

Consistent with *Storer*, three federal courts of appeals have held that a state law imposes a "qualification" for Article I purposes only if it necessarily excludes from office a person who captures the majority vote at the ballot box. The First Circuit in *Hopfmann v. Connolly* held that a law does not impose a "qualification" for office for purposes of Article I unless that law renders a candidate ineligible to hold office if he or she garners a majority of the votes cast in an election. 746 F.2d at 102-03. The law at issue provided that only candidates receiving 15% of the vote on a ballot at the convention could challenge the convention's endorsement in a state primary election. The court of appeals sustained that provision against a challenge based on the Qualifications Clauses. As the First Circuit explained, "the test to determine whether or not the 'restriction' amounts to a 'qualification' within the

meaning of Article I, Section 3, is whether the candidate 'could be elected if his name were written in by a sufficient number of electors.'" *Id.* at 103 (quoting *State v. Crane*, 197 P.2d 864, 871 (Wy. 1948)). The Ninth and Eleventh Circuits have followed that approach as well. See *Joyner v. Mofford*, 706 F.2d at 1531; *Public Citizen v. Miller*, 813 F. Supp. 821 (N.D. Ga.), *aff'd* on the basis of the district court opinion, 992 F.2d 1548 (11th Cir. 1993); see also *State ex rel. O'Sullivan v. Swanson*, 257 N.W. 255, 255-56 (Neb. 1934); *State ex rel. McCarthy v. Moore*, 92 N.W. 4 (Minn. 1902).

Under the foregoing decisions, ballot access measures, like Amendment 73, are a clear example of a lawful exercise of the States' Elections Clause power to regulate the "Manner" of federal elections. That Clause vests in the States the right to decide how votes are cast: by lever in booths, by punch cards, by coupons, or by whatever devices new technologies produce. James Madison made that specific point at the Convention. 2 *Farrand* 240-41. Arkansas could lawfully decide, for instance, that all ballots will be cast as write-in ballots, whether for incumbents or challengers, since a candidate has no right under the Constitution to have his or her name appear on a printed ballot. Indeed, such a claim would have been alien to the Framers. During their era, electors typically voted by voice vote, by a show of hands, by handwritten ballot, or by using an item, such as an ear of corn, to signify their choice. Ark. Const. of 1836, § 8 ("[a]ll general elections shall be viva voce until otherwise directed by law"); John L. Ferguson & J.H. Atkinson, *Historic Arkansas* 67 (1966); L.E. Fredman, *The Australian Ballot: The Story of An American Reform* 20-21 (1968); 1 Charles Seymour & Donald Paige Frary, *How the World Votes* 217-20, 246-48 (1918); e.g., Albert Edward McKinley, *The Suffrage Franchise in the Thirteen English Colonies in America* 22, 101-02, 111 (1905). Until the late 1800s, all ballots cast in this country were write-in ballots; the system of state-prepared ballots was introduced no earlier than 1888. Prior to

that time, voters composed their own ballots or used preprinted tickets prepared by political parties. L.E. Fredman, *supra*, at ix, 7-9, 20-21; 1 Charles Seymour & Donald Paige Frary, *supra*, at 250-52; *Burdick*, 112 S. Ct. at 2070 (Kennedy, J., dissenting); *Burson*, 112 S. Ct. at 1852. Since the institution of state-sponsored, preprinted ballots became commonplace, and because States restrict the number of candidates who can be listed on such ballots, it has always been the case that some citizens cannot vote for the candidate of their choice unless they exercise a write-in option. Across-the-board use of the write-in process would be a valid exercise of the States' power to regulate the manner of federal elections. The States' more selective use of that power therefore does not impose a "qualification" on federal office within the meaning of Article I.

Ballot access laws are a reasonable exercise of the States' authority under the Elections Clause. That Clause vests in the States authority "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley*, 285 U.S. at 366. The "fundamental right involved" is the right to be governed by delegates responsible and responsive to the electorate. Entrenched incumbency threatens that right to no less a degree than electoral fraud. According to James Madison, "[t]he genius of republican liberty seems to demand on one side not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people by a short duration of their appointments[.] * * * A frequent change of men will result from a frequent return of elections; and a frequent change of measures from a frequent change of men * * *." *The Federalist* No. 37, at 227. The Delegates to the Constitutional Convention believed that the benefits of rotation would be achieved by virtue of the short term served by Representatives. Although for much of our history the Framers estimate proved correct, that is no longer the case. Term limits are a reasonable attempt to achieve

the fundamental values described by Madison and others in light of present-day political realities.

To be sure, Amendment 73 does not require all candidates for federal office to stand for election as write-in candidates; only certain incumbents must seek re-election in that way, and the court below was troubled by that fact. Pet. App. 15a. But the question whether Amendment 73 impermissibly discriminates against incumbents is better viewed as raising an equal protection concern, than as imposing an additional "qualification" on federal elected office. Insofar as Amendment 73 is criticized on the ground that it unfairly excludes long-term incumbents from the ballot and burdens them with the need to run as write-in candidates while permitting the remaining candidates to appear on the ballot, the perceived vice in Amendment 73 lies not in its use of the write-in procedure per se, which itself is lawful, but in the preferential treatment afforded challengers and short-term incumbents, who are exempted from reliance on the write-in process. That claim raises a classic equal protection issue, which would be analyzed under the standard articulated in *Burdick* and *Anderson*, since it is the different treatment afforded the two categories of candidates (long-term incumbents vs. everyone else), not the mere use of the write-in mechanism, that would generate concern. The constitutionality of Amendment 73 should be analyzed under traditional equal protection principles, not as adding an "additional qualification" to office, as the court below held.³⁸

³⁸ This Court and the lower courts have consistently upheld term limit laws over First and Fourteenth Amendment claims, even without a write-in option and even if the ban lasts for a lifetime. See, e.g., *State ex rel. Maloney v. McCartney*, 223 S.E.2d 607 (W. Va.), appeal dismissed for want of a substantial federal question, 425 U.S. 946 (1976) (upholding two-term limit for governor); *Miyazawa v. City of Cincinnati*, 825 F. Supp. 816, 821 (S.D. Ohio 1993) (upholding term limits for city council members); *Legislature v. Eu*, 816 P.2d 1309, 1327-28 (Cal. 1991) (upholding term limits for state legislators because "the interests of the state in incumbency reform outweigh any injury to incumbent office holders and those

B. Amendment 73 Is A Permissible Ballot Access Restriction

As Justice Cracraft explained in dissent below, Pet. App. 37a-39a, the ballot access restrictions imposed by Amendment 73 do not fix a "qualification" for the office of Representative or Senator under the test applied by the First, Ninth, and Eleventh Circuits, since that Amendment does not prevent a candidate who receives the majority of votes cast at the election from holding those offices. The text of the Amendment itself makes that point clear. The Amendment only restricts access to the ballot for congressional candidates, while imposing a strict term limit on state officers.

The Arkansas Supreme Court readily acknowledged that an incumbent could run for the House or Senate as a write-in candidate and that any write-in candidate receiving a majority of the votes cast at a general election would be entitled to hold office. Pet. App. 15a. The

who would vote for them"), cert. denied, 112 S. Ct. 1292, 1293 (1992); *Maddox v. Fortson*, 172 S.E.2d 595, 598-99 (Ga.) (upholding term limits for state offices), cert. denied, 397 U.S. 149 (1970); *Roth v. Cuevas*, 158 Misc. 2d 238, 603 N.Y.S.2d 962, aff'd, 624 N.E.2d 689 (N.Y. 1993). Term limits rationally promote legitimate and compelling state interests, like the ones set forth in Amendment 73, quoted at pp. 3, 4a. Term limits do not offend the First Amendment since they do not regulate on the basis of political ideology or affiliation, only on the basis of incumbency, which is a politically-neutral criterion. Nor do such term limits trespass on the Fourteenth Amendment. By definition incumbents are not politically powerless and in need of special protection from the majoritarian political process, cf., e.g., *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (indeed, the theory upon which term limits rests is that the opposite is true); the status of "incumbency" is not an immutable characteristic (at least one would hope), like race, that is entitled to heightened judicial protection, cf., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 445 (1985); and term limits do not infringe on a fundamental right, since there is no fundamental right to hold office, run as a candidate, or vote for any particular individual, see, e.g., *Burdick*, 112 S. Ct. at 2063-64; *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983); *Clements v. Fashing*, 457 U.S. 957 (1982).

procedure to become a write-in candidate in Arkansas is not onerous.³⁹

Nonetheless, the court below equated the practical difficulties facing a write-in candidate with a prohibition on holding office, because write-in candidates, according to the court below, have only a "glimmer of opportunity" for success. That fear is misplaced, for two reasons.

To begin with, although it is doubtless the case that ballot access restrictions may make it more difficult for some write-in candidates to win some elections, that is not always true. In fact, a write-in candidate won election to Congress from Arkansas in 1958. *Historical Report of the Arkansas Secretary of State 1986*, at 236 (Steve Faris ed. 1986). The standard applied by the First, Ninth, and Eleventh Circuits does not treat a restriction as a "qualification" unless it prohibits a candidate who is victorious at the polls from holding office *as a matter of law*. Since Amendment 73 does not have that effect, it should not be treated as a "qualification" under Article I. In addition, Arkansas election statistics show that there has been virtually no competition for federal office since World War II. See App. I, *infra*. Without Amendment 73, challengers will continue to have *less* than a "glimmer of opportunity" of success. Amendment 73 does not create a new problem; it remedies an existing one.

³⁹ To appear as a write-in candidate for Congress in Arkansas, a candidate (or his agent) must notify the Secretary of State of his intention at least 60 days before the general election. 6A Ark. Code Ann. § 7-5-205 (Michie Supp. 1993). A blank line is then printed on the ballot. *Id.* § 7-7-208(h)(3). Only votes for the candidates who have notified the Secretary of State of their intention to run as a write-in will be counted. *Id.* § 7-5-205. Candidates must file a pledge that they are familiar and will comply with state election law. *Id.* § 7-6-102(a)(1)(4). A candidate must complete a background information form and supply a picture. Hence, there are but two prerequisites to run as a write-in candidate for congressional office—notification of intent to run, and the pledge—neither of which imposes a significant burden. It is more burdensome for a candidate to have his or her name appear on the printed ballot in Arkansas. P. 17 n.24, *supra*.

Amendment 73 compares favorably with the state laws upheld in *Storer* and *Burdick*. *Storer* upheld a state law excluding from the ballot as an independent candidate anyone who lost in the primary or was registered in a political party, while *Burdick* sustained a state law that altogether prohibited write-in votes. Amendment 73 imposes no greater burden on candidates and voters than the laws upheld in those cases, since it allows long-term incumbents to be re-elected through the write-in process.

III. STATES CAN IMPOSE TERM LIMITS ON THE OFFICES OF REPRESENTATIVE AND SENATOR

A. The Qualifications Clauses Do Not Prohibit The States From Imposing Qualifications For The Offices Of Representative And Senator

1. Constitutional analysis, like statutory interpretation, must begin with the text of the relevant law, and "the plain language of the enacted text is the best indicator of intent." *Nixon v. United States*, 113 S. Ct. 732, 737 (1993). The Qualifications Clauses provide that "[n]o Person shall be a Representative [or Senator] who shall not have attained to the Age of twenty five Years [or 30], and been seven [or nine] Years a citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in [or from] which he shall be chosen." Art. I, § 2, Cl. 2, and § 3, Cl. 3. The Clauses do not state that they impose "uniform" or "exclusive" requirements for office. Compare Art. I, § 8, Cl. 1 (requiring "Duties, Imports and Excises" to be "uniform throughout the United States"), Cl. 4 (authorizing Congress to establish "uniform" naturalization and bankruptcy laws), Cl. 17 (authorizing Congress to exercise "exclusive" power over the District of Columbia). The Clauses also are written as a prohibition, viz., as disqualifications from office. In other words, rather than declare that all persons satisfying those qualifications are eligible for congressional office, the Qualifications Clauses are more naturally read to disqualify anyone who fails the three defined criteria. The Clauses define a floor, or minimum qualifications that an

official must possess, thereby allowing States to add additional ones.

The court below read the Qualifications Clauses as being exclusive in order to ensure that they impose uniform requirements nationwide. That approach is mistaken. The Qualifications Clauses also refer to citizenship and inhabitancy, yet, in 1790 those concepts were defined by state law. The definition of citizenship was not uniform throughout the new nation, and there was no constitutional definition of citizenship until the Fourteenth Amendment was ratified in 1868. The definition of inhabitancy depended on state law (and does still), particularly on the issue of what length and type of absence from the State constituted a forfeiture of residency. Accordingly, because the States had the power to define the concepts of citizenship and inhabitancy for purposes of the Qualifications Clauses, it is dubious that the Clauses impose uniformity on the States in every other regard, thereby ousting them of their historic power to set qualifications for elected office. Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. 97, 117-19 (1991).⁴⁰

Related provisions of the Constitution also show that the Qualifications Clauses do not define exclusive qualifications for Representative and Senator. The Impeachment Clause, Art. I, § 3, Cl. 7, authorizes disqualification from federal office of any person convicted after being impeached. The Incompatibility Clause, Art. I, § 6, Cl. 2, bars anyone from simultaneously holding office

⁴⁰ The first recorded contested election case in Congress, *Ramsey v. Smith*, involved the issue whether a member sent from South Carolina qualified as an inhabitant of that State and a citizen of the United States. M. St. Clair Clarke and David A. Hall, *Cases of Contested Elections in Congress* 23-37 (1834) (hereafter "Contested Elections"). In 1789, the Committee of Elections determined that both questions were to be resolved by the law of South Carolina: "I take it to be a clear point, that we are to be guided, in our decision, by the laws and constitution of South Carolina, so far as they can guide us * * *." *Id.* at 32 (speech of Mr. Madison).

in the Legislative and Executive Branches. The Oath or Affirmation Clause, Art. VI, Cl. 3, requires Congressmen to take an oath or to affirm to support the Constitution, while the companion Religious Test Clause prohibits the federal and state governments from imposing a religious test as a qualification for federal office, thereby indicating that such a test otherwise could have been imposed. Finally, Section 3 of the Fourteenth Amendment disqualified anyone who fought on behalf of the Confederacy during the Civil War. Taken together, these provisions show that the Qualifications Clauses do not fix the exclusive prerequisites for Congress and that other relevant sections of the Constitution must be considered. The Elections Clause and Tenth Amendment are such provisions, and they support the constitutionality of ballot access laws, like Amendment 73.

The conclusion that the Qualifications Clause do not bar the States from adding requirements to hold office is supported by the text of Art. I, § 10, Cls. 1-3. Those sections declare that "[n]o State shall" undertake certain actions, such as "enter into any Treaty, Alliance, or Confederation," "coin Money," "grant any Title of Nobility," or enact specific types of laws, such as "any Bill of Attainder, ex post facto Law, or Law impairing the obligation of Contracts." Those clauses show that the Framers knew how to impose an express prohibition on the States but chose not to do so in the Qualifications Clauses. A State's imposition of qualifications on Representatives and Senators thus is consistent with the overall structure of Article I.⁴¹

⁴¹ For that reason, we disagree with the conclusion held by Justice Joseph Story, Professor Charles Warren, and Judge Thomas Cooley. 1 Joseph Story, *supra*, § 624, reprinted in 2 *The Founders' Constitution* 243; Charles Warren, *The Making of the Constitution* 420-22 & n.1 (1937); Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 331 (1931). They invoke the "expressio unius, exclusio alterius" rule of construction, viz., that by specifying certain prerequisites, the Qualifications Clauses necessarily exclude all others. That rule of construction must give way, however, when there is strong evidence to the contrary, as there is in this case.

The Tenth Amendment is also relevant, because it reserves to "the States" or "the people" all powers not granted to the national government nor prohibited to the States elsewhere in the Constitution. At worst, the text of the Constitution is silent or ambiguous with regard to the question presented by this case. The Constitution does not expressly vest authority in the national government to impose additional qualifications for the House and the Senate, nor does it expressly prohibit the States from doing so. Under these circumstances, the Tenth Amendment offers a valuable interpretive guide, because it instructs the courts to resolve doubts about the legality of laws like Amendment 73 in favor of "reserving" to the States or the people the "power[]" to regulate the electoral process within each State. See generally Amicus Br. of Washington Legal Foundation; Amicus Br. of Nebraska *et al.*

It is no objection to Amendment 73 that its purpose is to limit the tenure of Representatives and Senators. The Qualifications Clauses do not contain an element of intent akin to the one that is applied under the Equal Protection Clause, see *Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979), because the two Clauses serve wholly different purposes. Public financing of challengers' campaigns would not be unconstitutional under the Qualifications Clauses even if its purpose was to unseat incumbents, because a law underwriting the cost of a campaign excludes no one from the ballot, let alone from office. Accordingly, while it is true that a purpose and hoped-for effect of Amendment 73 is to increase rotation in office, that intent is immaterial to its constitutionality.

There is no need to read the Qualifications Clauses as exclusive in order to protect the integrity of the federal system. The Constitution preserved the States' power "to determine the qualifications of their most important government officials," *Gregory*, 111 S. Ct. at 2402, since that authority posed no threat to the national government or any other State. A State that sets term limits for its

Representatives and Senators imposes no burden on the federal government's ability to exercise its delegated powers. In addition, since the Constitution reserved to the States the greater power to set voting qualifications for federal officers, it is illogical to conclude that the States' exercise of the lesser power to set qualifications to hold such offices threatens the federal government in some way. In any event, Congress has the power under the Elections Clause to supersede laws enacted by the States, so that the federal government is fully able to impose a uniform rule should it decide to do so. Cf. *Roudebush v. Hartke*, 405 U.S. 15 (1972). Also, one State's decision to retire its long-term incumbents forces no other State to pursue that course. Thus, contrary to the Arkansas Supreme Court's belief, there is no need to construe the Qualifications Clauses as mandating uniformity in order to safeguard the interests of the national government or other States.

Interpreting the Constitution as reserving to the States the power to impose additional qualifications for federal office also sensibly allocates power in our federal system. For example, Arkansas and other States deny felons and the mentally incompetent the right to vote for or hold state office and deny felons the right to vote in federal elections. Pp. 9-10 n.5, *supra*. It would be anomalous to rob States of the right to keep those persons from serving in Congress. If States cannot set qualifications for their congressmen, they would have no power over their characteristics, even though States have the power to select characteristics for the electorate. Here, too, the greater power reasonably includes the lesser.⁴²

⁴² Justice Story said that States did not reserve the right under the Tenth Amendment to set additional qualifications for the House and Senate, since those offices did not exist until the Constitution created them. 1 Joseph Story, *supra*, §§ 625-29, at 461-63. But Justice Story's predicate is wrong: Article V of the Articles of Confederation authorized States to select delegates by whatever method they chose. Since Article I of the Constitution did not delegate that power to the federal government, the Tenth Amendment reserved it to the States. *New York v. United States*, 112 S. Ct. 2408, 2417 (1992). Insofar as Justice Story feared that allowing

2. The drafting history of the Qualifications Clauses supports our interpretation of its text. The original version of the Virginia Plan, prepared by Edmund Randolph, provided that "[t]he qualifications of (a) delegates shall be the age of twenty five years at least, and citizenship: (and any person possessing these qualifications may be elected except) * * *." 2 *Farrand* 139 (emphasis added). The Committee of Detail omitted the language making the listed qualifications exclusive before reporting the provision to the Committee of the Whole at the Convention. 2 *id.* at 137 n.6, 178. As reported, the Clause read as follows: "Every member of the House of Representatives shall be of the age of twenty five years at least; shall have been a citizen of the United States for at least three years before his election; and shall be, at the time of his election, a resident of the State in which he shall be chosen." 2 *id.* at 178. When read against its background, that statement still does not constitute an affirmative expression of exclusivity, as did the earlier version of the Clause. The Committee of the Whole later referred the matter to the Committee of Style, which revised the Clauses into their present, negative form. *Powell*, 395 U.S. at 537. While the Committee of Style lacked power substantively to amend provisions adopted by the Committee of the Whole, 2 *Farrand* 553; *Powell*, 395 U.S. at 538; *Nixon*, 113 S. Ct. at 740, the Committee of Detail already had made the important change by deleting the exclusivity language. Thus, the drafting history of Article I reveals that the Framers did not intend to define exclusive qualifications.

Also relevant in this regard is the drafting history of the Electors Clause, which authorized the State to impose voting qualifications. The delegates considered a property ownership qualification for office, but ultimately chose not to do so.⁴³ The debate over a property qualification for

States to set additional qualifications is inconsistent with the nature of a national government, term limits do not threaten the national government, as explained in the text.

⁴³ After deciding not to incorporate term limits into the Constitution, the Committee of the Whole considered a motion by George

office indicates that at least some of the delegates decided against that prerequisite since it would be impossible for the Convention or Congress to select a uniform rule, *not* since property qualifications were disfavored. Property qualifications to vote or hold office were not repugnant concepts to the Framers; freehold requirements were common in the States. *The Anti-Federalist Papers and the Constitutional Convention Debates* 9 (Ralph Ketchum ed. 1986); Robert C. DeCarli, Note, *The Constitutionality of State-Enacted Term Limits Under The Qualifications Clauses*, 71 Tex. L. Rev. 865, 879 (1993); Albert Edward McKinley, *The Suffrage Franchise in the Thirteen*

Mason directing the Committee of Detail to draft a clause requiring property and citizenship qualifications for Congress and disqualifying persons indebted to the national government. 2 *Farrand* 121. During the ensuing debate, opponents of the motion argued that it would perversely disqualify those individuals who had contributed to the war effort, that the goal of excluding corrupt legislators was better achieved by imposing appropriate qualifications on the electors, and that any partial list of disqualifications would leave the legislature bereft of authority to establish others. 2 *id.* at 121-26. For example, John Dickenson believed that "[i]t was impossible to make a compleat" recital of disqualifications, that "a partial one would by implication tie up the hands of the Legislature from supplying omissions," and that, as the result, "[t]he best defense lay in the freeholders who were to elect the Legislature." 2 *id.* at 123. James Wilson agreed, saying that "a partial enumeration of cases will disable the Legislature from disqualifying odious [and] dangerous characters." 2 *id.* at 125. The Committee of Detail could not agree on qualifications, 2 *id.* at 249 (John Rutledge), and proposed a clause stating that the "Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient." 2 *id.* at 179. The Committee of the Whole resumed its consideration of the matter by debating a proposal by Charles Pinckney to add specific property requirements. 2 *id.* at 248-49. Gouverneur Morris moved to strike the qualifier "with regard to property," in order "to leave the Legislature entirely at large." 2 *id.* at 250. James Wilson agreed, believing that "[a] uniform rule would probably never be fixed by the Legislature," so that "this particular power would constructively exclude every other power of regulating qualifications." 2 *id.* at 251. The delegates thereafter voted against incorporating a property qualification into the Constitution. *Id.*

English Colonies in America (1905); 1 Charles Seymour & Donald Paige Frary, *How the World Votes* 210-11 (1918); cf. Charles Beard, *An Economic Interpretation of the Constitution of the United States* (1913). That conclusion is significant for the light it sheds on the Convention's decision not to incorporate term limits into the Constitution. The Convention's decision to reject the term limits features of the Virginia Plan cannot be interpreted as a condemnation of that principle because it is equally consistent with the conclusion that the Framers found undesirable the imposition of a uniform rule. Robert C. DeCarli, 71 Tex. L. Rev. at 879-80.

3. Congress also has expressed the judgment that the Qualifications Clauses are not exclusive. Throughout our history, Congress has enacted laws fixing qualifications (or, more precisely, imposing disqualifications) for Representatives and Senators. The First and Second Congresses enacted such laws;⁴⁴ Congress thereafter approved state constitutions that impose additional qualifications on Representatives and Senators;⁴⁵ and today various criminal code provisions disqualify felons from federal office.⁴⁶

⁴⁴ Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 67; Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 117; Act of May 8, 1792, ch. 37, § 12, 1 Stat. 281.

⁴⁵ After the Civil War, pursuant to the Act of Mar. 2, 1867, 14 Stat. 428, in order to be readmitted to the Union Florida had to obtain Congress's approval of its state constitution. See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?—The Original Understanding*, 2 Stan. L. Rev. 5, 126 (1949). The Florida Constitution of 1868 required Representatives and Senators to have been a state resident for two years, a citizen of the United States for nine years, and a registered voter. Fla. Const. of 1868, § 23. Congress readmitted Florida to the Union in the Act of June 25, 1868, 15 Stat. 73, thereby signifying that Congress saw no constitutional objection to the additional Florida qualifications.

⁴⁶ *E.g.*, 18 U.S.C. §§ 201, 203, 592, 593, 1901, 2071, 2381, 2383; see *De Veau v. Braisted*, 363 U.S. 144, 159 (1960); see also, *e.g.*, 5 U.S.C. §§ 7324-7327 (the Hatch Act); *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (rejecting First Amendment challenge to Hatch Act).

That long series of acts is strong proof that Congress finds the Qualifications Clauses not exclusive. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 722 (1986).

B. *Powell v. McCormack* Does Not Prohibit States From Imposing Qualifications For The Offices Of Representative And Senator

The Arkansas Supreme Court believed that the holding in *Powell v. McCormack* answered the question presented by this case, but *Powell* involved a different issue. There, the House of Representatives denied Adam Clayton Powell his seat after his re-election based on Powell's alleged violations of House internal rules. This Court held that the House lacks power to add to the qualifications specified in Art. I, § 2, Cl. 2, when it judges those qualifications under Art. I, § 5. 395 U.S. at 547-48. This case, by contrast, involves a state law regulating access to the ballot, rather than the House's power to adjudicate the qualifications of duly-elected members. *Powell* did not address the power of the States to require candidates for Congress to meet certain conditions under state election law. In fact, this Court acknowledged that Powell had been "duly elected" under New York law, *id.* at 522, without addressing whether the state restrictions under which Powell was elected constituted "qualifications."⁴⁷ *Powell* held at most that each House lacks authority to exclude a person who is not ineligible under the Constitution to serve and who has been duly elected under the laws of

⁴⁷ New York law in 1966 included the following requirements: A candidate for the House had to be a registered voter in the State and had to satisfy durational and county residency requirements. A candidate could not have been convicted of any felony or any other infamous crime, and also could not have been adjudged mentally incompetent. A candidate also must have been literate in the English language; he must have satisfied political party enrollment requirements; he must have filed nominating petitions bearing a certain number of signatures as well as statements accepting the nomination and acknowledging his fulfillment of statutory requirements; and he must have satisfied state citizenship requirements. See N.Y. Elec. Law §§ 136, 137, 139, 147, and 152 (consol. 1964) (superceded).

the State that he seeks to represent. This Court's later decision in *Storer* makes clear that *Powell* does not treat all exclusions as "qualifications."

In interpreting Congress's power under Art. I, § 5, Cl. 1, to exclude otherwise qualified Members, this Court in *Powell* relied heavily on the practices of Parliament and colonial assemblies, the debates at the Constitutional Convention and in the States during the pre-ratification period, and Congress's post-ratification practice. 395 U.S. at 522-48. The court below relied on *Powell* and the history it discussed in interpreting the breadth of the Qualifications Clauses. Pet. App. 12a. In so doing, the Arkansas Supreme Court utterly failed to recognize that "historical evidence must be weighed as well as cited." *Nixon v. Fitzgerald*, 457 U.S. 731, 752 n.31 (1982). Much of the history discussed in *Powell* is not relevant here, and what is relevant is consistent with our interpretation of the Qualifications Clauses.

The discussion in *Powell* of the precedents expelling members of Parliament and colonial assemblies for acts of misconduct, 395 U.S. at 522-27, is irrelevant to the question whether States can set additional qualifications. *Powell* cited a comment by Alexander Hamilton that "[t]he qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature." *Id.* at 539, citing *The Federalist* No. 60, at 371. The "legislature" to which Hamilton referred is Congress, since the burden of his essay was to show that Congress's power over the "times, places, and manner" of elections could not threaten the union. *Id.* at 540. Indeed, Hamilton's statement cannot be read literally, because Article I did not "define and fix" qualifications of "the persons who may choose"; it left that power to the States. P. 11, *supra*.⁴⁸

⁴⁸ *Powell* also cited similar remarks by James Madison. 395 U.S. at 533-34 and 540 n.74, citing 2 *Farrand* 249-250 and *The Federalist* No. 52, at 326 (J. Madison). Madison's statements also are best

Early cases of contested elections in Congress confirm the Framers' view that the qualifications in Article I were a floor, not a ceiling, and that where the Qualifications or Elections Clauses were silent, state election law must be applied. The early decisions of the House Committee on Elections recognized that the "right to judge, and the rule of decision, are distinct things; and, while the right to judge may be in one body, the prescription of the rule may be in another. The rule, in such cases as these, must be a State regulation, when it relates to points on which the States have exclusive legislation." *Spaulding v. Mead* (1805), reprinted in *Contested Elections* 161; see also *Ramsey v. Clark* (1789), reprinted at *id.* at 23-37, and quoted at p. 37 n.40, *supra*. With a few possible exceptions,⁴⁹ the early House and Senate Committees on Elections did not decide a contested election in a manner inconsistent with the view that the Qualifications Clauses are not exclusive.⁵⁰

seen as addressed to Congress, as the Court recognized elsewhere in *Powell*, 395 U.S. at 534.

⁴⁹ On two occasions in the 19th century, the House faced the issue whether States could add qualifications. In both cases, contestants challenged the election of Representatives who also held state office at the time of election, in violation of state law. See *Turney v. Marshall* and *Fouke v. Trumbull*, reported in Chester H. Rowell, *supra*, at 141-42; *Wood v. Peters*, reported in *id.* at 401-02. In both instances, the delegates retained their seats notwithstanding the contrary state law, but dissents in both cases argued that States could impose such qualifications. "To hold otherwise would be to hold invalid provisions in the constitutions of nearly all the States (a complete list of which was given in the report), some of which were adopted before the Constitution itself." Chester H. Rowell, *supra*, at 402 (citing Report of Mr. Bennett). State resign-to-run laws are now deemed a lawful regulation of federal elections. *E.g.*, *Joyner*, 706 F.2d at 1531.

⁵⁰ The majority of contested election cases decided in the first fifty years of the Republic concerned allegations of voting irregularities. *E.g.*, *Jackson v. Wayne* (1791), reprinted in *Contested Elections* 47-68; *Easton v. Scott* (1816), *id.* at 272-86; *Loyall v. Newton* (1830), *id.* at 520-600. Other decisions reflect a strict adherence to other *disqualifications* under the federal constitution, *e.g.*, *In re Van Ness* (1802), *id.* at 521 ("The acceptance by a

Powell cited the recommendation of the House Committee of Elections in *Barney v. McCreery*, an 1807 election dispute in Maryland, for the proposition that States cannot add qualifications to Article I. In *McCreery*, the Committee recommended that the House admit William McCreery to his seat. The challenger claimed that McCreery had not met the state requirement of residence in Baltimore City, and the Committee rejected that claim on the ground that the Maryland law was invalid. State law required that one of the two district representatives be a town resident, with the other being a county resident. That law, according to the Committee, was "repugnant to the constitution, and therefore void." *Id.* at 167. The full House, however, rejected the form of the Committee's resolution. Based on its own resolution that did not denounce the Maryland law as unconstitutional, the House voted overwhelmingly (by a vote of 89-18) to seat McCreery without a report after it went to considerable lengths to gather evidence on whether McCreery complied with state law. *Id.* at 217-219; compare 17 *Annals of Congress* 882-86 (1807) (Mr. Randolph) with *id.* at 911-915 (Mr. Key), reprinted in 2 *The Founders' Constitution* 77-81. What *Powell* did not recognize is that not only did the House reject the Committee's resolution that the Maryland law was unconstitutional, but also that the Committee's resolution itself was aberrant: The resolution was inconsistent with other decisions by the Committee on Elections (as noted during the debates) and with practice before then.

* * * * *

member of any Office under the United States, after he has been elected to, and taken his seat in Congress, operates as a forfeiture of his seat."); and latitude to the States to experiment with the manner of selecting its federal representatives, *e.g.*, *In re Lanman* (1825), *id.* at 871-76 (although there was no express provision for selection of Senators by State governors when vacancies occur, the Senate Committee of Elections recognized that many states employed this practice, although a governor cannot appoint to fill a vacancy that has not yet occurred).

We end where we began: Term limits and ballot access restrictions are a legitimate, historically-accepted, and judicially-approved means of ensuring that the public receives the benefits of rotation in elected office. Whether they are seen as merely regulating access to the ballot or are deemed to impose qualifications on federal elected office is far less important than is whether they are recognized as being a permissible exercise of the States' power under Article I and the Tenth Amendment to regulate the federal electoral process. History and reason resoundingly prove that they are.

CONCLUSION

The judgment of the Supreme Court of Arkansas should be reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

Pertinent Constitutional Provisions

1. Art. I, § 2, Cl. 1 (the Voting Clause), of the Constitution provides as follows:

[T]he electors in each State shall have the Qualifications requisite for the Electors of the most numerous Branch of the State Legislature.

2. Art. I, § 2, Cl. 2 (the House Qualifications Clause), of the Constitution of the United States provides as follows:

No Person shall be a Representative who shall not have attained to the Age of twenty-five years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

3. Art. I, § 3, Cl. 3 (the Senate Qualifications Clause), of the Constitution of the United States provides as follows:

No Person shall be a Senator who shall not have attained to the Age of thirty years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

4. Art. I, § 3, Cl. 7 (the Impeachment Clause), of the Constitution of the United States provides as follows:

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

5. Art. I, § 4, Cl. 1 (the Elections Clause), of the Constitution of the United States provides as follows:

The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations, except as to the Places of choosing Senators.

6. Art. I, § 6, Cl. 2 (the Incompatibility Clause), of the Constitution of the United States provides as follows:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a member of either House during his Continuance in Office.

7. Art. I, § 10, Cls. 1-3, of the Constitution provides as follows:

No State shall enter into any Treasury, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contract, or grant any Title of Nobility.

No State, shall without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imports, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or

Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

8. Art. VI, Cl. 3 (the Oath or Affirmation Clause and the Religious Test Clause), of the Constitution of the United States provides as follows:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

9. Section 3 of the Fourteenth Amendment of the Constitution of the United States provides as follows:

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

10. The Tenth Amendment to the Constitution of the United States provides as follows:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

11. Amendment 73 to the Arkansas Constitution provides as follows:

PREAMBLE:

The people of Arkansas find and declare that elected officials who remain in office too long become pre-occupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of elected officials.

SECTION 1—Executive Branch

(a) The executive Department of this State shall consist of a Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, all of whom shall keep their offices at the seat of government, and hold their offices for the term of four years, and until their successors are elected and qualified.

(b) No elected officials of the Executive Department of this State may serve in the same office more than two such four year terms.

SECTION 2—Legislative Branch

(a) The Arkansas House of Representatives shall consist of members to be chosen every second year by the qualified electors of the several counties. No member of the Arkansas House of Representatives may serve more than three such two year terms.

(b) The Arkansas Senate shall consist of members to be chosen every four years by the qualified electors of the several districts. No member of the Arkansas Senate may serve more than two such four year terms.

SECTION 3—Congressional Delegation

(a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas.

(b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas.

SECTION 4—Severability

The provisions of this Amendment are severable, and if any should be held invalid, the remainder shall stand.

SECTION 5—Provisions Self-Executing

Provisions of this Amendment shall be self-executing.

SECTION 6—Application

(a) This Amendment to the Arkansas Constitution shall take effect and be in operation on January 1, 1993, and its provisions shall be applicable to all persons thereafter seeking election to the offices specified in this Amendment.

(b) All laws and constitutional provisions which conflict with this Amendment are hereby repealed to the extent that they conflict with this Amendment.

APPENDIX B

**Term Limits And Qualifications On Public Officials
Prior To The Adoption Of The Constitution****1. Connecticut****A. Fundamental Orders of Connecticut, 1638-39**

No person could be chosen governor more than once in two years. Conn. Fund. Orders of 1638-39, order 4, *reprinted in 1 Federal and State Constitutions* 519, 520 (Francis N. Thorpe ed. 1909) (hereinafter Thorpe). In addition, the governor had to be a member of some approved congregation, and formerly of the magistracy of the jurisdiction and all the magistrate freemen of the commonwealth. *Id.*

No person could be chosen as the deputy for any general court or assembly who was not a freeman of the commonwealth. *Id.* order 7, *reprinted in 1 Thorpe* 519, 521.

B. Fundamental Agreement, or Original Constitution of the Colony of New-Haven, June 4, 1639

Only church members could be free burgesses, magistrates and other public officers. New Haven Fund. Agree. or Orig. Const. of 1639, query V, *reprinted in 1 Thorpe* 523, 525.

**C. Government of New Haven Colony, October 27/
November 6, 1643**

Only members of approved churches could be free burgesses and hold power or trust in the ordering of any civil affairs. New Haven Gov't of 1643, order 1, *reprinted in 1 Thorpe* 526, 526. Only church members could be chosen as judges. *Id.* order 2, *reprinted in 1 Thorpe* 526, 527.

D. Charter of Connecticut, 1662

The governor, deputy governor, and 12 assistants were chosen out of the freemen of the company. Conn. Chart. of 1662, *reprinted in* 1 Thorpe 529, 530.

2. Delaware**A. Charter of Delaware, 1701**

All persons professing to believe in Jesus Christ, notwithstanding their specific religion, were deemed capable of serving as a legislator or executive. Del. Chart. of 1701, art. I, *reprinted in* 1 Thorpe 557, 558.

No person within the government could be licensed to keep an ordinary tavern or house of public entertainment. *Id.* art. VII, *reprinted in* 1 Thorpe 557, 560.

B. Constitution of Delaware, 1776

County representatives to the house of assembly were chosen from the freeholders of the county. Del. Const. of 1776, art. 3, *reprinted in* 1 Thorpe 562, 562.

Three persons for each county were chosen as members of the council; the members of the council had to be freeholders of the county they represented, and upwards of 25 years of age. *Id.* art. 4, *reprinted in* 1 Thorpe 562, 562.

After serving a three-year term of office, the president of the state was ineligible for another term until the expiration of three years after leaving office. *Id.* art. 7, *reprinted in* 1 Thorpe 562, 563.

Regular officers of the army or navy of the continent or any state were not eligible to serve on the privy council. *Id.* art 8, *reprinted in* 1 Thorpe 562, 563-64.

If a member of the legislative council or house of assembly was elected to the privy council, he would lose his seat in the legislature. *Id.* art. 8, *reprinted in* 1 Thorpe 562, 564.

Members of the privy council were ineligible for a second term for three years after leaving the privy council. *Id.*

The delegates from Delaware to the Congress of the United States were chosen annually, or superseded in the meantime, by joint ballot of both houses of the general assembly. *Id.* art. 11, *reprinted in* 1 Thorpe 562, 564.

While in office, state court justices were prohibited from holding any additional office other than in the militia. *Id.* art. 12, *reprinted in* 1 Thorpe 562, 564.

Persons having served three annual terms as a county sheriff were ineligible to hold that office for the next three years. *Id.* art. 15, *reprinted in* 1 Thorpe 562, 565.

Justices of the state courts, members of the privy council, certain other state officials, and persons concerned with any army or navy contracts were ineligible for a position in either house of the general assembly. *Id.* art. 18, *reprinted in* 1 Thorpe 562, 565.

Every person chosen as a member of either house of assembly or appointed to any office or place of trust had to take an oath declaring his belief in certain religious tenants. *Id.* art. 22, *reprinted in* 1 Thorpe 562, 566.

No clergyman or preacher was deemed capable of holding state office or serving in the state legislature while he continued in the exercise of the pastoral function. *Id.* art. 29, *reprinted in* 1 Thorpe 562, 567-68.

C. An Act for Regulating Elections, and Ascertaining the Number of the Members of Assembly, 1704-1741

No inhabitants of the government of Delaware had the right of being elected unless: (1) they were natural born subjects of Great Britain, or were naturalized in England, Delaware or Pennsylvania; (2) they were 21 years of age or upwards; (3) they were freeholders in Delaware, and had at least 50 acres of well settled land, 12 acres

of which were cleared and improved, or otherwise worth 40 pounds; and (4) they had been residents of the land for at least two years before the election. Act for Regulating Elections, and Ascertaining the Number of the Members of Assembly, *reprinted in The Earliest Printed Laws of Delaware 1704-1741*, at 86 (John D. Cushing ed. 1978).

3. Georgia

A. Charter of Georgia, 1732

The positions of president of the colonial corporation and chairman of the common council of the corporation were rotated for every meeting among all the members of the corporation. Ga. Chart. of 1732, *reprinted in 2 Thorpe 765, 768*. A person who had served as president or chairman at the previous meeting was ineligible to serve in these positions at the next meeting. *Id.*, *reprinted in 2 Thorpe 765, 769*.

While a person served as a treasurer or secretary of the corporation, he was incapable of being a member of the corporation. *Id.*, *reprinted in 2 Thorpe 765, 773*.

Persons with a continuing interest in lands granted by the corporation were deemed incapable of being a member of the corporation. *Id.*, *reprinted in 2 Thorpe 765, 774*.

B. Constitution of Georgia, 1777

Members of the state legislature had to have resided in the state for at least 12 months and in the county they represented for at least three months. Ga. Const. of 1777, art. VI, *reprinted in 2 Thorpe 777, 779*. They also had to be Protestants, be at least 21 years old, and be owners of 250 acres of land or some property worth 250 pounds. *Id.*

No person who held a continuing title of nobility was capable of serving as a representative or other state official. *Id.* art. XI, *reprinted in 2 Thorpe 777, 780*.

The continental delegates were appointed annually by ballot, and had the right to sit, debate, and vote in the house of assembly, and were deemed a part thereof, subject, however to the regulations contained in the Twelfth Article of the Confederation of the United States. *Id.* art. XVI, *reprinted in 2 Thorpe 777, 780*. Article Twelve of the Articles of Confederation provided that debts contracted by Congress prior to the assembling of the United States were debts of the United States. U.S. Arts. of Confed. of 1777, art. XII, *reprinted in 1 Thorpe 9, 15*.

No person holding a post of profit under the state of Georgia or any person bearing a military commission under any state, except an officer of the militia, could be elected a state representative. Ga. Const. of 1777, art. XVII, *reprinted in 2 Thorpe 777, 780*. If any representative accepted such a post during his term, his seat immediately became vacant and he could not run for reelection while continuing to hold the post. *Id.*

No person could hold more than one office of profit at the same time. *Id.* art. XVIII, *in 2 Thorpe 777, 781*.

The governor was chosen annually by ballot and was not eligible to serve for more than one year out of three. *Id.* art. XXIII, *reprinted in 2 Thorpe 777, 781*. The governor also was prohibited from holding any military commission under any other state. *Id.* No person was eligible to serve as governor who had not resided in the state for three years. *Id.* art. XXIV, *reprinted in 2 Thorpe 777, 781*.

No clergyman was allowed a seat in the legislature. *Id.* art. LXII, *reprinted in 2 Thorpe 777, 785*.

C. An Act to Ascertain the Manner and Form of Electing Members to Represent the Inhabitants of this Province in the Common House of Assembly, 1761

Every person elected to the common house of assembly had to be qualified as follows: (1) he had to be a free born subject of Great Britain or its dominions, or a foreign person naturalized; (2) he had to be a Christian; (3) he had to be at least 21 years old; (3) he had to have been a resident of the province for at least 12 months; and (4) he had to own at least 500 acres of land in the province. Act to Ascertain the Manner and Form of Electing Members to represent the Inhabitants of this Province in the Common House of Assembly, art. VI (1761), *reprinted in 1 The Earliest Printed Laws of the Province of Georgia 1755-1770*, at 108 (John D. Cushing ed. 1978).

The provost-marshall managing an election was prohibited from returning himself as a member to serve in the general assembly. *Id.* art. VIII, *reprinted in 1 The Earliest Printed Laws of the Province of Georgia 1755-1770*, at 109.

4. Maryland

A. Constitution of Maryland, 1776

State chancellors and judges were prohibited from holding any other office, civil or military. Md. Const. of 1776, Decl. of Rights, art. XXX, *reprinted in 3 Thorpe 1686, 1689*.

Article XXXI provided that a long continuance in the first executive departments of power and trust was dangerous to liberty and stated that a rotation in those departments was one of the best securities of personal freedom. *Id.* art. XXXI, *reprinted in 3 Thorpe 1686, 1689*.

Persons were prohibited from holding, at the same time, more than one office of profit. *Id.* art. XXXII, *reprinted in 3 Thorpe 1686, 1689*.

Article XXXV provided that no other test or qualification should be required on admission to any office of trust or profit other than an oath of support and fidelity to the state, an oath of office, and a declaration of a belief in the Christian religion. *Id.* art. XXXV, *reprinted in 3 Thorpe 1686, 1690*.

To qualify for the house of delegates, a person had to: (1) reside in the county from where they were chosen for one year preceding the election; (2) be above 21 years of age; and (3) have real or personal property in the state valued at more than 500 pounds. Md. Const. of 1776, Form of Gov't, art. II, *reprinted in 3 Thorpe 1686, 1691*.

To qualify for the state senate, a person had to: (1) reside in the state for more than three years preceding the election; (2) be above 25 years of age; and (3) have real and personal property valued at more than 1,000 pounds. *Id.* art. XV, *reprinted in 3 Thorpe 1686, 1693-94*.

To qualify for the council to the governor, a person had to: (1) reside in the state for more than three years preceding the election; (2) be above 25 years of age; and (3) have land valued at more than 1,000 pounds in the state. *Id.* art. XXVI, *reprinted in 3 Thorpe 1686, 1695*.

Maryland's delegates to congress were chosen annually, or superseded in the mean time, by joint ballot of both houses of the assembly. *Id.* art. XXVII, *reprinted in 3 Thorpe 1686, 1695*. The delegates had to be rotated so that at least two of them were changed annually. *Id.* No person was permitted to serve as one of Maryland's delegates to congress for more than three of six years. *Id.* No person who held an office of profit in the gift of congress was eligible to sit in congress. *Id.* No person was eligible to sit in congress as a delegate from Maryland unless he: (1) was above 21 years old; (2) had been

a resident of the state for more than five years preceding the election; and (3) had real and personal estate in Maryland valued at more than 1,000 pounds. *Id.* art. XXVII, reprinted in 3 Thorpe 1686, 1695-96.

No person was eligible to serve as governor unless he: (1) was above 25 years of age; (2) had been a resident of the state for more than five years preceding the election; and (3) had real and personal property in the state valued at more than 5,000 pounds of which 1,000 had to be a freehold estate. *Id.* art. XXX, reprinted in 3 Thorpe 1686, 1696.

A person could not serve as governor for more than three years successively, and former governors could not serve again until four years after leaving office. *Id.* art. XXXI, reprinted in 3 Thorpe 1686, 1696.

Senators, delegates to the assembly, and members of the council were prohibited from holding any office of profit, or receiving the profits of any office held by another person. *Id.* art. XXXVII, reprinted in 3 Thorpe 1686, 1697. The governor was prohibited from holding any other Maryland office of profit. *Id.* The following persons were also disqualified from holding a seat in the general assembly or the council of Maryland: (1) anyone holding a place of profit or receiving any part of the profits thereof; (2) anyone receiving profits from supplying clothing or provisions to the army or navy; (3) anyone holding any office under the United States or another state; (4) ministers and preachers; and (5) any person employed in the regular land service or marine of Maryland or the United States. *Id.*

Delegates to Congress, state senators, delegates to the assembly, and members of the Council were prohibited from holding or executing any office of profit or receiving the profits from such an office held by another person. *Id.* art. XXXIX, reprinted in 3 Thorpe 1686, 1697. Persons violating this provision could be forever disqualified from holding any office or place of trust or profit. *Id.*

County sheriffs were elected to three year terms and were ineligible for reelection for four years after leaving office. *Id.* art. XLII, reprinted in 3 Thorpe 1686, 1698. To be eligible for the office of county sheriff, a person had to: (1) be an inhabitant of the county; (2) be above 21 years old; and (3) have real and personal property in the state valued at more than 1,000 pounds. *Id.*

Field officers of the militia were ineligible to serve as a senator, delegate, or member of the council. *Id.* art. XLV, reprinted in 3 Thorpe 1686, 1699.

Civil officers appointed for a particular county had to reside in that county for six months before their appointment and had to continue residing in the county while in office. *Id.* art. XLVI, reprinted in 3 Thorpe 1686, 1699.

B. An Act Directing the Manner of Electing and Summoning Delegates and Representatives to Serve in Succeeding Assemblies, and for Ascertaining the Expenses of the Councillors, Delegates of Assembly and Commissioners of the Provincial and County Courts of this Province, 1716

To qualify as a county delegate to the general assembly, a person had to be a freeman of the county, and had to own a freehold of 50 acres of land or be a resident having a viable estate of at least 40 pounds within the county. Act Directing the Manner of Electing and Summoning Delegates and Representatives to Serve in Succeeding Assemblies, and for Ascertaining the Expenses of the Councillors, Delegates of Assembly and Commissioners of the Provincial and County Courts of this Province (1716), reprinted in *The Laws of the Province of Maryland*, at 186 (John D. Cushing ed. 1978). County sheriffs were not eligible to serve as delegates. *Id.* The keeper of an ordinary (tavern) within the province and other persons disabled by the laws of England from serving in

parliament were ineligible to serve in the general assembly. *Id.*

5. Massachusetts

A. The Charter of Massachusetts Bay, 1629

The governor, deputy governor and 18 assistants were elected and chosen out of the freemen of the company. Mass. Bay Chart. of 1629, *reprinted in* 3 Thorpe 1846, 1852.

B. The Charter of Massachusetts Bay, 1691

The representatives to the general court of assembly consisted of the governor, and assistants, as well as freeholders of the province or territory elected by the freeholders and other inhabitants. Mass. Bay Chart. of 1691, *reprinted in* 3 Thorpe 1870, 1878.

C. Explanatory Charter of Massachusetts Bay, 1725

The representatives to the general court of assembly consisted of the governor, and assistants, as well as freeholders of the province or territory elected by the freeholders and other inhabitants. Mass. Bay Explan. Chart. of 1725, *reprinted in* 3 Thorpe 1886, 1886-87.

D. An Act for Ascertaining the Number, and Regulating the House of Representatives, 1692

Representatives to the great court of Assembly were chosen from among freeholders. Act for Ascertaining the Number, and Regulating the House of Representatives (1692), *reprinted in Massachusetts Province Laws 1692-1699*, at 52 (John D. Cushing ed. 1978).

E. An Act to Prevent Default of Appearance of Representatives to Serve in the General Assembly, 1693

Representatives of a town were required to be freeholders and residents of that town. Act to Prevent De-

fault of Appearance of Representatives to Serve in the General Assembly (1693), *reprinted in Massachusetts Province Laws 1692-1699*, at 77 (John D. Cushing ed. 1978).

F. Constitution or Form of Government For the Commonwealth of Massachusetts, 1780

This constitution provided that "[i]n order to prevent those who are vested with authority from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life." Mass. Const. of 1780, pt. 1, art. VIII, *reprinted in* 3 Thorpe 1888, 1890-91.

No person was capable of being elected as a state senator unless: (1) he owned a freehold within the commonwealth of at least 300 pounds, or possessed a personal estate of at least 600 pounds, or both to the amount of the same sum; (2) he had been an inhabitant of the commonwealth for the five years immediately preceding the election; and (3) at the time of the election, he was an inhabitant of the district choosing the senator. *Id.* pt. 2, ch. I, § II, art. V, *reprinted in* 3 Thorpe 1888, 1897.

No person was qualified to serve in the commonwealth's house of representatives unless for at least one year preceding the election: (1) he was an inhabitant of the town choosing the representative; and (2) he owned a freehold valued at 100 pounds in the town choosing the representative, or owned an estate valued at 200 pounds. *Id.* pt. 2, ch. I, § III, art. III, *reprinted in* 3 Thorpe 1888, 1898. A person ceased to represent the town upon ceasing to possess those qualifications. *Id.*

No person was eligible to serve as governor unless: (1) at the time of his election, he had been an inhabitant of the commonwealth for the preceding seven years; (2)

at the same time, he owned a freehold with the commonwealth of the value of 1,000 pounds; and (3) he declared himself to be a Christian. *Id.* pt. 2, ch. II, § I, art. II, reprinted in 3 Thorpe 1888, 1900.

The lieutenant-governor had to be qualified in the same manner as the governor on the points of religion, property, and residence. *Id.* pt. 2, ch. II, § II, art I, reprinted in 3 Thorpe 1888, 1903.

The Massachusetts delegates to the Congress of the United States were elected annually by joint ballot of the commonwealth legislature. *Id.* pt. 2, ch. IV, reprinted in 3 Thorpe 1888, 1906. They could be recalled and replaced at any time during the year. *Id.*

Any person chosen governor, lieutenant-governor, councillor, senator, or representative had to declare that he believed the Christian religion, and possessed the property required as a qualification for his office. *Id.* pt. 2, ch. VI, art I, reprinted in 3 Thorpe 1888, 1908.

The governor, lieutenant-governor, and judges of the supreme court were prohibited from holding any other state office, unless specifically authorized in the constitution. *Id.* pt. 2, ch. VI, art. II, reprinted in 3 Thorpe 1888, 1909. They were also prohibited from holding any office, or receiving any salary, from any other state or government. *Id.*

No person holding one of several enumerated state offices was permitted to also hold a seat in the state legislature. *Id.* Persons were prohibited from ever holding more than one of the following offices: judge of probate, sheriff, register of probate, or register of deeds. *Id.* In addition, no person could hold more than two of any other state appointed offices. *Id.*

No person could hold a seat in the legislature, or any office of trust or importance under the commonwealth if convicted of bribery or corruption in obtaining an election or appointment. *Id.* 3 Thorpe 1888, 1910.

6. New Hampshire

A. An Act to Return Able and Sufficient Jurors to Serve in the Several Courts of Justice, and to Regulate the Election of Representatives to Serve in the General Assembly within this Province, 1699

No person other than freeholders of the value or income of 40 shillings per year or more in land, or of 50 pounds in personal estate, were capable of being elected to serve in the general assembly. Act to Return Able and Sufficient Jurors to Serve in the Several Courts of Justice, and to Regulate the Election of Representatives to Serve in the General Assembly within this Province (1699), reprinted in *Acts and Laws of New Hampshire 1680-1726*, at 24 (John D. Cushing ed. 1978).

B. Constitution of New Hampshire, 1766

Members of the council, a branch of the legislature, were selected from among the reputable freeholders and inhabitants of the colony. N.H. Const. of 1776, reprinted in 4 Thorpe 2451, 2452.

C. Constitution of New Hampshire, 1784

Every inhabitant of the state having the proper qualifications had an equal right to be elected into office. N.H. Const. of 1784, pt. I, art. I, para. XI, reprinted in 4 Thorpe 2453, 2455.

Every person qualified as the constitution provided was considered an inhabitant for the purpose of being elected to state office, in the town, parish, and plantation where he dwelled and had his home. *Id.* pt. II, reprinted in 4 Thorpe 2453, 2459.

No person was capable of being elected a senator who was not: (1) a Protestant; (2) the owner of a freehold estate within New Hampshire valued at 200 pounds; (3)

30 years old; (4) an inhabitant of the state for seven years immediately preceding his election; and (5) at the time of the election, an inhabitant of the district electing him. *Id.* pt. II, in 4 Thorpe 2453, 2460.

Every member of the house of representatives was required: (1) to have been an inhabitant of the state for two years immediately preceding his election; (2) to have owned, for two years immediately preceding his election, an estate within the place he would represent valued at 100 pounds, one half of which had to be a freehold; (3) at the time of his election, to be an inhabitant of the place he would represent; and (4) to be a Protestant. *Id.* pt. II, reprinted in 4 Thorpe 2453, 2461-62. A person would cease to be a representative immediately upon ceasing to meet these qualifications. *Id.*

No person was eligible to serve as the president of New Hampshire unless: (1) at the time of his election, he had been an inhabitant of the state for the immediately preceding seven years; (2) he was 30 years old; (3) at the same time, he owned an estate valued at 500 pounds, one half of which had to be a freehold within the state; and (4) he was a Protestant. *Id.* pt. II, reprinted in 4 Thorpe 2453, 2462-63.

The qualifications for counsellors were the same as those required for senators. *Id.* pt. II, reprinted in 4 Thorpe 2453, 2465.

The New Hampshire delegates to the Congress of the United States had to have the same qualifications as those required for the president of New Hampshire. *Id.* pt. II, reprinted in 4 Thorpe 2453, 2467. No person was capable of being a delegate to Congress for more than three years in any term of six years. *Id.* No delegate to Congress was capable of holding any office under the United States for which he, or any other for his benefit, received any salary or emolument. *Id.*

The president and judges of the superior court were prohibited from holding any other state office, unless

specifically authorized in the constitution. *Id.* pt. II, reprinted in 4 Thorpe 2453, 2469. They were also prohibited from holding any office, or receiving any salary, from any other state or government. *Id.*

No person holding one of several enumerated state offices was permitted to also hold a seat in the state legislature. *Id.* Persons were prohibited from ever holding more than one of the following offices: judge of probate, sheriff, and register of deeds. *Id.* In addition, no person could hold more than two of any other state appointed offices. *Id.*

No person could hold a seat in the legislature, or any office of trust or importance under the state, if convicted of bribery or corruption in obtaining an election or an appointment. *Id.* pt. II, reprinted in 4 Thorpe 2453, 2470.

7. New Jersey

A. The Concession and Agreement of the Lords Proprietors of the Province of New Caesarea, or New Jersey, to and with All and Every the Adventurers and All Such as Shall Settle or Plant There, 1664

Twelve deputies or representatives to the general assembly were selected by and among the freemen inhabiting the province. Concession and Agreement of the Lords Proprietors of the Province of New Caesarea, or New Jersey, to and with All and Every the Adventurers and All Such as Shall Settle or Plant There, pt. 1, item 9 (1664), reprinted in 5 Thorpe 2535, 2537.

Without the consent of the general assembly, only freeholders of the province could be appointed as a judge or other civil officer. *Id.* pt. 3, art. II, reprinted in 5 Thorpe 2535, 2539.

B. A Declaration of the True Intent and Meaning of Us the Lords Proprietors, and Explanation of There Concessions Made to the Adventurers and Planters of New Caesarea or New Jersey, 1672

No person was counted as a freeman, capable of being elected for any office, until he held lands by patent from the lords proprietors. Declaration of the True Intent and Meaning of Us the Lords Proprietors, and Explanation of There Concessions Made to the Adventurers and Planters of New Caesarea or New Jersey, pt. 1, art. I (1672), *reprinted in 5 Thorpe 2544, 2544-45.*

C. The Charter or Fundamental Laws, of West New Jersey, Agreed Upon, 1676

Upon the second instance of bearing false witness in a criminal case, a person was disabled forever from being admitted into any public office within the province. Charter or Fundamental Laws, of West New Jersey, Agreed Upon, ch. XX (1676), *reprinted in 5 Thorpe 2548, 2550-51.*

D. Province of West New-Jersey, In America, the 25th of the Ninth Month Called November, 1681

No person was rendered incapable of office on account of their faith and worship. Province of West New-Jersey, In America, the 25th of the Ninth Month Called November, art. X (1681), *reprinted in 5 Thorpe 2565, 2567.*

E. The Fundamental Constitutions For the Province of East New Jersey in America, Anno Domini, 1683

Although the original governor was elected to serve for life and good behavior, subsequent governors were limited to a three year term. Fundamental Constitutions For the Province of East New Jersey in America, art. I (1683), *reprinted in 5 Thorpe 2574, 2574.* Persons advising that a subsequent governor should serve for a longer term or

that the governor, or his son, should be chosen again, "within the three years," were considered public enemies. *Id.* Subsequent governors accepting such continued service were also considered public enemies. *Id.*

Publicly elected members of the great council served three year terms, after which they were not "capable to come in again for two years after, and therefore they [were not] put in the ballot in elections for that year." *Id.* art. II, *reprinted in 5 Thorpe 2574, 2575.*

Persons qualified to be freemen, capable of being chosen for the great council, were every planter and inhabitant dwelling and residing in the province who: (1) had 50 acres of land, and had cultivated ten acres of it; (2) in the boroughs, had a house and three acres; or (3) was only renting a house and land, but had 50 pounds in stock of his own. *Id.* art. III, *reprinted in 5 Thorpe 2574, 2575.* Anyone giving or accepting a bribe in an election forfeited forever their right to be elected. *Id.*

Persons were prohibited from nominating for a seat on the great council someone known to be guilty for a year before of adultery, whoredom, drunkenness, or any such immorality or who is insolvent or a fool. *Id.*

The great council also consisted of the 24 largest land owners, or proprietors of the colony; if a proprietor did not retain at least one fourth of his propriety, however, he lost his seat in the government. *Id.* art. XIII, *reprinted in 5 Thorpe 2574, 2578.* Proprietors under 21 years old were not permitted to vote in the great council. *Id.* 5 Thorpe 2574, 2579.

No man could be admitted to the great or common council or other place of public trust unless he professed his faith in Jesus Christ, and declared he would not prejudice others based on their differing religious beliefs. *Id.* art. XVI, *reprinted in 5 Thorpe 2574, 2580.*

Persons were prohibited from holding more than one public office at one time. *Id.* art. XVII, *reprinted in 5 Thorpe 2574, 2580.*

F. An Act Regulating the Qualifications of Representatives to Serve in the General Assembly in this Province of New Jersey, 1709

Every person elected to serve as a representative in the general assembly had to own 1,000 acres of land or be worth 500 pounds in real and personal estate. Act Regulating the Qualifications of Representatives to Serve in the General Assembly in this Province of New Jersey (1709), *reprinted in The Earliest Printed Laws of New Jersey 1703-1722*, at 5-6 (John D. Cushing ed. 1978).

Every person elected as a representative for a county to the general assembly had to be a freeholder in the division he was chosen to represent. *Id.* No person who was not a freeholder was capable of being elected to the general assembly. *Id.*

G. An Act for Better Qualifying Representatives to Serve in General Assembly within this Province, 1709

No person was capable of being elected a representative of any city, town or county to the general assembly who was not inhabiting and residing on the date of election, and for three months preceding, the city, town, or county in which he was elected. Act for Better Qualifying Representatives to Serve in General Assembly within this Province (1709), *reprinted in The Earliest Printed Laws of New Jersey 1703-1722*, at 11 (John D. Cushing ed. 1978).

No person was capable of serving in the general assembly who did not have an estate within the division in which he was elected sufficient to qualify him. *Id.*

H. Constitution of New Jersey, 1776

A member of the legislative council of the colony of New Jersey had to be: (1) and have been for the year immediately preceding the election, an inhabitant and

freeholder in the county he was to represent; and (2) worth at least 1,000 pounds, of real and personal estate within the same county. N.J. Const. of 1776, art. III, *reprinted in 5 Thorpe 2594, 2595.*

No person was entitled to a seat in the assembly unless he was: (1) and had been for the year immediately preceding the election, an inhabitant of the county he was to represent; and (2) worth 500 pounds, in real and personal estate within the same county. *Id.*

Annually, the council and the assembly jointly elected a fit person within the colony to be governor for one year. *Id.* art. VII, *reprinted in 5 Thorpe 2594, 2596.*

County sheriffs and coroners were elected to one year terms of office. *Id.* art. XIII, *reprinted in 5 Thorpe 2594, 2597.* After someone had served three one year terms as sheriff or coroner, they were not capable of being elected again until three years had elapsed. *Id.*

Commissioners of appeal were selected from among judicious freeholders of good character. *Id.* art. XIV, *reprinted in 5 Thorpe 2594, 2597.*

Any Protestant demeaning themselves peaceably under the government was capable of: (1) being elected to any office of profit or trust; or (2) being a member of either branch of the legislature. *Id.* art. XIX, *reprinted in 5 Thorpe 2594, 2597-98.*

No judge, sheriff, or any other person holding a post of profit under the government could hold a seat in the assembly. *Id.* art. XX, *reprinted in 5 Thorpe 2594, 2598.*

8. New York

A. Constitution of New York, 1777

The state senate consisted of 24 freeholders chosen out of the body of freeholders. N.Y. Const. of 1777, art. X, *reprinted in 5 Thorpe 2623, 2631.*

Annually, a wise and discreet freeholder had to be elected governor by the freeholders of the state. *Id.* art. XVII, *reprinted in* 5 Thorpe 2623, 2632. The lieutenant-governor was elected in the same manner as the governor. *Id.* art. XX, *in* 5 Thorpe 2623, 2633.

Judges held their offices during good behavior or until they reached 60 years of age. *Id.* art. XXIV, *reprinted in* 5 Thorpe 2623, 2634.

The chancellor and judges of the supreme court could not, at the same time, hold any other office, except that of delegate to the general congress, upon special occasions. *Id.* art. XXV, *reprinted in* 5 Thorpe 2623, 2634. First judges of the county courts could not hold any other office at the same time, except that of senator or delegate to the general congress. *Id.*

Sheriffs and coroners were appointed annually and no person was capable of holding either office for more than four years successively. *Id.* art. XXVI, *reprinted in* 5 Thorpe 2623, 2634. The sheriff was incapable of holding any other office at the same time. *Id.*

Delegates representing New York in the Congress of the United States were annually appointed as follows: the senate and assembly each nominated a number of persons equal to the whole number of delegates to be appointed; those persons on both lists became delegates; one half of the persons not on both lists were also elected as delegates by a joint ballot of both houses. *Id.* art. XXX, *reprinted in* 5 Thorpe 2623, 2634-35.

Ministers and priests were not eligible to hold any civil or military office within the state. *Id.* art. XXXIX, *reprinted in* 5 Thorpe 2623, 2637.

9. North Carolina

A. A Declaration and Proposals of the Lord Proprietor of Carolina, Aug. 25-Sept. 4, 1663

Deputies or assemblymen for a legislative body were chosen by the freeholders out of themselves. Declaration and Proposals of the Lord Proprietor of Carolina, art. 4 (1663), *reprinted in* 5 Thorpe 2753, 2754-55.

B. Concessions and Agreements of the Lords Proprietors of the Province of Carolina, 1665

The freemen inhabiting the province chose, from amongst themselves, 12 deputies or representatives to the general assembly. Concessions and Agreements of the Lords Proprietors of the Province of Carolina, pt. 1, item 10 (1665), *in* 5 Thorpe 2756, 2757-58.

Without the consent of the general assembly, only freeholders could be appointed as judges and other civil officials. *Id.* pt. 3, item 2, *reprinted in* 5 Thorpe 2756, 2760.

C. The Fundamental Constitutions of Carolina, 1669

The seven chief offices of state were enjoyed by none but the lord proprietors. Fundamental Constitutions of Carolina, art. 2, (1669), *reprinted in* 5 Thorpe 2772, 2772.

The hereditary nobility were by the right of their dignity members of parliament. *Id.* art. 9, *reprinted in* 5 Thorpe 2772, 2773.

Sheriffs and justices had to be inhabitants of, and had to have at least 500 acres of freehold within, the county or district that they served. *Id.* art. 61, *reprinted in* 5 Thorpe 2772, 2779-80.

Precinct stewards and justices had to be inhabitants of, and had to have at least 300 acres of freehold within, their precinct. *Id.* art. 63, *reprinted in* 5 Thorpe 2772, 2780.

No man could be chosen as a member of the parliament who had less than 500 acres of freehold within the precinct for which he was chosen. *Id.* art. 72, reprinted in 5 Thorpe 2772, 2781.

No man could be a register of any precinct who did not have at least 300 acres of freehold within the precinct. *Id.* art. 82, reprinted in 5 Thorpe 2772, 2782.

No man could be a register of colony who did not have at least 50 acres of freehold within the colony. *Id.* art. 85, reprinted in 5 Thorpe 2772, 2782.

Constables of a colony had to have an estate above 100 acres in the colony. *Id.* art. 91, reprinted in 5 Thorpe 2772, 2783.

No person above the age of 17 was capable of any place of profit or honor unless his name was recorded in one, and only one, church record. *Id.* art. 101, reprinted in 5 Thorpe 2772, 2784.

D. Constitution of North Carolina, 1776

Each member of the senate: (1) had to reside in the county from which he was chosen for one year immediately preceding his election; and (2) for the same time he had to have possessed, and had to continue to possess, not less than 300 acres of land, in fee, within the county he represented. N.C. Const. of 1776, pt. 2, art. V, reprinted in 5 Thorpe 2787, 2790.

Each member of the house of commons: (1) had to reside in the county from which he was chosen for one year immediately preceding his election; and (2) for six months had to have possessed, and had to continue to possess, not less than 100 acres of land, in fee or for the term of his own life, within the county he represented. *Id.* pt. 2, art. VI, reprinted in 5 Thorpe 2787, 2790.

The house and senate of North Carolina jointly elected a governor for one year, who was not eligible for that

office longer than three years in six successive years. *Id.* pt. 2, art. XV, reprinted in 5 Thorpe 2787, 2791. No person was eligible to serve as governor who: (1) was under 30 years of age; (2) had not been a resident of North Carolina above five years; or (3) did not have a freehold of lands and tenements above the value of 1,000 pounds within the state. *Id.*

No person who received public monies could have a seat in either house of the general assembly or be eligible for any state office until such person paid into the treasury all sums for which they might have been accountable and liable. *Id.* pt. 2, art. XXV, reprinted in 5 Thorpe 2787, 2792.

No state treasurer could hold a seat in either house of the general assembly or council of state, during his continuance in that office, or before he finally settled his accounts with the public. *Id.* pt. 2, art. XXVI, reprinted in 5 Thorpe 2787, 2792.

No officer in the regular army or navy of the United States, North Carolina, or any other state, nor any contractor or agent supplying such army or navy with clothing or provisions, could have a seat in either house of the general assembly or the council of state. *Id.* pt. 2, art. XXVII, reprinted in 5 Thorpe 2787, 2792.

No member of the council of state could have a seat in either house of the general assembly. *Id.* pt. 2, art. XXVIII, reprinted in 5 Thorpe 2787, 2792.

Certain judges and persons holding certain executive posts could not hold a seat in either house of the general assembly or the council of state. *Id.* pt. 2, arts. XXIX & XXX, reprinted in 5 Thorpe 2787, 2792.

No clergyman or preacher was capable of serving in either house of the general assembly or the council of state. *Id.* pt. 2, art. XXXI, reprinted in 5 Thorpe 2787, 2793.

No person who denied the being of God, or the Protestant religion, or certain other religious tenants was capable of holding any office of trust or profit in the civil department of the state. *Id.* pt. 2, art. XXXII, reprinted in 5 Thorpe 2787, 2793.

No person in the state could hold more than one lucrative office at a time, however, a militia appointment and the office of a justice of the peace were not considered lucrative offices. *Id.* pt. 2, art. XXXV, reprinted in 5 Thorpe 2787, 2793.

Delegates for North Carolina to the Continental Congress were chosen annually by ballot of the general assembly, but could be superseded in the mean time. *Id.* pt. 2, art. XXXVII, reprinted in 5 Thorpe 2787, 2793. No person could be elected to serve as a delegate for North Carolina to the Continental Congress for more than three years successively. *Id.*

E. An Act for Qualification of Public Officers, 1715

No person other than someone commissioned by the lords proprietors of Carolina could execute an office of profit or trust within the government until he gave to the government a secured bond for the faithful discharge of his office payable to the lords proprietors. Act for Qualification of Public Officers, art. III (1715), reprinted in 2 *The Earliest Printed Laws of N. Carolina 1669-1751*, at 15 (John D. Cushing ed. 1977).

10. Pennsylvania

A. Penn's Charter of Liberties, 1682

The freemen of the province selected representatives from among themselves to serve a three year term in a provincial council. Penn's Charter of Liberties, items 2-3 (1682), reprinted in 5 Thorpe 3047, 3048. The terms were staggered so that one third of the council was elected each year. *Id.* item 3, reprinted in 5 Thorpe 3047, 3048.

After the first seven years, every one leaving the council was incapable of being chosen again for one whole year so that all were fit for the government and experienced the care and burden of it. *Id.* item 4, reprinted in 5 Thorpe 3047, 3048.

B. Frame of Government of Pennsylvania, 1682

The following persons were deemed freeholders capable of being elected as a representative to the provincial council or general assembly: (1) every inhabitant of the province that purchased at least 100 acres of land, and his heirs and assigns; (2) every person who paid his passage and took 100 acres of land, at one penny an acre, and have cultivated ten acres thereof; (3) every prior servant or bonds-man, free by his service, who took up his 50 acres of land and cultivated 20 acres thereof; and (4) every inhabitant, artificer, or other resident in the province that paid scot and lot (an assessment based on the ability to pay) to the government. Frame of Government of Pennsylvania, pt. 3, item II (1682), reprinted in 5 Thorpe 3052, 3060.

A person who bribed an elector for his vote forfeited his election and was incapable of serving in the council or general assembly. *Id.* pt. 3, art. III, reprinted in 5 Thorpe 3052, 3060.

Persons that falsified or forged documents or records were dismissed of all places of trust. *Id.* pt. 3, art. XXI, in 5 Thorpe 3052, 3061.

No person could hold more than one public office at one time. *Id.* pt. 3, art. XXVII, reprinted in 5 Thorpe 3052, 3062.

All members of the provincial council, and the general assembly, and all other officers of the government: (1) had to possess faith in Jesus Christ; (2) could not have been convicted of ill fame or unsober and dishonest conversation; and (3) had to be at least 21 years old. *Id.* pt. 3, art. XXXIV, reprinted in 5 Thorpe 3052, 3062-63.

C. Frame of Government of Pennsylvania, 1696

No inhabitant of the province or territories of Pennsylvania had the right of being elected unless they: (1) were free denizens of the Pennsylvania government; (2) were at least 21 years old; (3) had 50 acres of land, ten acres of which were seated and cleared, or were otherwise worth 50 pounds; and (4) had been a resident within the government of Pennsylvania for two years immediately preceding the election. *Frame of Government of Pennsylvania (1696), reprinted in 5 Thorpe 3070, 3071.*

Persons who bribed an elector for his vote, or offered to serve for nothing or at a reduced salary were incapable of serving in council or assembly for that year. *Id.*, *reprinted in 5 Thorpe 3070, 3073.*

D. Charter of Privileges Granted by William Penn, Esq. to the Inhabitants of Pennsylvania and Territories, 1701

All persons who professed to believe in Jesus Christ were capable, notwithstanding their specific religion, of serving the government in any capacity. *Charter of Privileges Granted by William Penn, Esq. to the Inhabitants of Pennsylvania and Territories, art. I (1701), reprinted in 5 Thorpe 3076, 3077.*

This charter provided that the qualifications of the elected remained as established by a 1700 law entitled "An Act to Ascertain the Number of Members of Assembly, and to Regulate the Elections." *Id. art. II, reprinted in 5 Thorpe 3076, 3078.*

E. Constitution of Pennsylvania, 1776

This constitution provided that to restrain legislators and executives from oppression, the people had a right to reduce their public officers to a private station, and supply the vacancies by certain and regular elections. *Penn. Const. of 1776, pt. 1, art. VI, reprinted in 5 Thorpe 3081, 3083.*

All free men having a sufficient evident common interest with, and attachment to, the community had a right to be elected into office. *Id. pt. 1, art. VII, reprinted in 5 Thorpe 3081, 3083.*

No person could be elected to Pennsylvania's house of representatives unless he had resided in the city or county for which he would be chosen for two years immediately before the election; nor could any member hold concurrently any other office, except in the militia. *Id. pt. 2, § 7, reprinted in 5 Thorpe 3081, 3084.*

No person was capable of being elected a member to serve in the state house of representatives for more than four years in seven. *Id. pt. 2, § 8, reprinted in 5 Thorpe 3081, 3084.*

Each member of the state house of representatives was required to make a specified religious declaration before taking his seat. *Id. pt. 2, § 10, reprinted in 5 Thorpe 3081, 3085.* No other religious test was required of any civil officer or magistrate of the state. *Id.*

Delegates to represent Pennsylvania in Congress were chosen annually by ballot of the general assembly. *Id. pt. 2, § 11, reprinted in 5 Thorpe 3081, 3085.* The general assembly could supercede a delegate at any time. *Id.* No man representing Pennsylvania could sit in Congress longer than two years successively, nor be capable of reelection for three years afterwards. *Id.* No man who held an office in the gift of Congress could be elected to represent Pennsylvania in Congress. *Id.*

Members of the supreme executive council were elected to serve three years and no longer. *Id. pt. 2, § 19, reprinted in 5 Thorpe 3081, 3087.* One third of the seats on the supreme executive council were up for election each year. *Id.* In addition, any person who had served as member of the supreme executive council for three successive years was incapable of holding that office for four years afterwards. *Id.* The constitution explained that:

[b]y this mode of election and continual rotation, more men will be trained to public business, there will in every subsequent year be found in the council a number of persons acquainted with the proceedings of the foregoing years, whereby the business will be more consistently conducted, and moreover the danger of establishing an inconvenient aristocracy will be effectually prevented.

Id. No member of the state general assembly or delegate in Congress could be chosen as a member of the supreme executive council. *Id.* The treasurer of the state and other specified state officials were not capable of a seat in the state general assembly, executive council or Continental Congress. *Id.*

Judges of the Pennsylvania supreme court of judicature were not allowed to sit as members in the Continental Congress, executive council, or general assembly, nor to hold any other civil or military office. *Id.* pt. 2, § 23, reprinted in 5 Thorpe 3081, 3088.

If a court officer took a fee greater than allowed by law, he was disqualified forever from holding any state office. *Id.* pt. 2, § 26, reprinted in 5 Thorpe 3081, 3088-89.

No justice of the peace could sit in the general assembly unless he first resigned his commission. *Id.* pt. 2, § 30, reprinted in 5 Thorpe 3081, 3089.

No person could be elected to the office of sheriff for more than three successive years, or be capable of being again elected during four years afterwards. *Id.* pt. 2, § 31, reprinted in 5 Thorpe 3081, 3089.

Any person who bribed an elector was incapable of serving for the ensuing year. *Id.* pt. 2, § 32, reprinted in 5 Thorpe 3081, 3089.

A foreigner was not capable of being elected a representative until after two years residence. *Id.* pt. 2, § 42, reprinted in 5 Thorpe 3081, 3091.

11. Rhode Island

A. Government of Rhode Island, March 16-19, 1641

The freemen deputed from among themselves government ministers. R.I. Gov't of 1641, art. 3, reprinted in 6 Thorpe 3207, 3207-08.

B. Charter of Rhode Island and Providence Plantations, 1663

The governor, deputy governor, and ten assistants were elected and chosen out of the freemen of the company. R.I. Chart. of 1663, reprinted in 6 Thorpe 3211, 3214. The assistants and six other freemen of the company constituted the general assembly. *Id.*

12. South Carolina

A. An Act to Ascertain the Manner and Form of Electing Members to Represent the Inhabitants of this Province in the Commons House of Assembly, and to Appoint Who Shall be Deemed and Adjudged Capable of Choosing or being Chosen Members of the Said House, 1721

Every person elected to serve as a member of the commons house of assembly had to be qualified as follows: (1) he had to be a free born subject of the Kingdom of Great Britain or its dominions, or a naturalized foreign person; (2) he had to have attained the age of 24 years; (3) he had to have been a resident of the province for 12 months before the election; and (4) he had to own a settled plantation or freehold in the province of at least 500 acres and ten slaves, or houses, buildings, town-lots, or other lands in the province valued at 1,000 pounds. Act to Ascertain the Manner and Form of Electing Members to Represent the Inhabitants of this Province in the Commons House of Assembly, and to Appoint Who shall be Deemed and Adjudged Capable of Choosing or being Chosen Members of the Said House, art. VIII (1721),

reprinted in 1 *The Earliest Printed Laws of South Carolina 1692-1734*, at 443 (John D. Cushing ed. 1978).

By vote of the commons house of assembly, any person convicted of certain illegal election practices could be rendered incapable of sitting or voting in the commons house of assembly. *Id.* art. XIV, reprinted in 1 *The Earliest Printed Laws of South Carolina 1692-1734*, at 445.

B. Constitution of South Carolina, 1776

No officer of the army or navy of the continent or South Carolina was eligible to be chosen for the privy council. S.C. Const. of 1776, art. V, reprinted in 6 Thorpe 3241, 3244.

The qualifications of the president and commander-in-chief, and vice president of South Carolina, and the members of the legislative and privy council were the same as those for the members of the general assembly. *Id.* art. VI, reprinted in 6 Thorpe 3241, 3244.

If a member of the general assembly or the legislative council accepted any place of emolument or any commission, except in the militia, he had to vacate his seat, but he was not disqualified from serving if reelected. *Id.* art. X, reprinted in 6 Thorpe 3241, 3244.

The qualifications of persons elected to the general assembly were the same as established in the election act, and construed to mean clear of debt. *Id.* art. XI, reprinted in 6 Thorpe 3241, 3245.

C. Constitution of South Carolina, 1778

The governor, lieutenant-governor, and members of the privy council all had to be Protestants. S.C. Const. of 1778, art. III, reprinted in 6 Thorpe 3248, 3249.

The governor and lieutenant-governor had to meet the following qualifications: (1) they had to have been residents in South Carolina for ten years; and (2) they had

to own a settled plantation or freehold in South Carolina valued at at least 10,000 pounds, clear of debt. *Id.* at V, reprinted in 6 Thorpe 3248, 3249.

Members of the privy council had to meet the following qualifications: (1) they had to have been residents in South Carolina for five years; and (2) they had to own a settled plantation or freehold in South Carolina valued at at least 10,000 pounds, clear of debt. *Id.*

No governor who had served for two years was eligible to serve as governor again until the full end and term of four years. *Id.* art. VI, reprinted in 6 Thorpe 3248, 3249.

No person could hold the office of governor or lieutenant-governor of South Carolina and hold, at the same time, any other civil or military office or commission (except in the militia) in South Carolina, any other state, or under the authority of the continental congress. *Id.* art. VII, reprinted in 6 Thorpe 3248, 3249.

Members of the privy council were elected to serve two years terms, and no member who had served for two years was eligible to serve again until the full end and term of four years. *Id.* art. IX, reprinted in 6 Thorpe 3248, 3249-50.

The following persons were not eligible to be elected to the privy council: (1) officers of the army or navy of South Carolina or the continent; (2) judges of any of the courts of law; and (3) fathers, sons, or brothers of the present governor. *Id.* art. IX, reprinted in 6 Thorpe 3248, 3250.

No person was eligible for a seat in the senate unless he: (1) was a Protestant; (2) was 30 years old; and (3) had been a resident in South Carolina for at least five years. *Id.* art. XII, reprinted in 6 Thorpe 3248, 3250. In addition, no person who resided in the district for which he was elected could take his seat in the senate, unless he owned a settled estate and freehold in the district valued at at least 2,000 pounds, clear of debt. *Id.*

art. XII, *reprinted in 6 Thorpe 3248, 3251*. No non-resident of the district was eligible to a seat in the senate unless he owned a settled estate and freehold in the district where he was elected valued at no less than 7,000 pounds, clear of debt. *Id.*

No person was eligible to sit in the house of representatives unless he: (1) was a Protestant; and (2) had been a resident in South Carolina for three years prior to his election. *Id.* art. XIII, *reprinted in 6 Thorpe 3248, 3252*. If a person was a resident of the district for which he was elected, his qualifications were the same as established in the election act, and construed to mean clear of debt. *Id.* No nonresident was eligible for a seat in the house of representatives unless he owned a settled estate and freehold in the district where he was elected valued at no less than 3,500 pounds, clear of debt. *Id.*

If a member of the senate or the house of representatives accepted any place of emolument or any commission, except for certain specified offices, he had to vacate his seat, but he was not disqualified from serving if reelected, unless he had been appointed as one of certain specified officials who were disqualified from being members of the senate or house of representatives. *Id.* art. XX, *reprinted in 6 Thorpe 3248, 3253*.

Ministers and preachers continuing in the exercise of pastoral functions, and for two years after, were not eligible to serve as governor, lieutenant-governor, or as a member of the senate, house of representatives or the privy council. *Id.* art. XXI, *reprinted in 6 Thorpe 3248, 3253*.

The delegates representing South Carolina in the Congress of the United States were chosen annually by joint ballot of the senate and house of representatives. This constitution did not require a delegate to vacate any seat he might have held in either house of the state legislature. *Id.* art. XXII, *reprinted in 6 Thorpe 3248, 3253*.

Sheriffs were chosen for two year terms, and no sheriff who served for two years was eligible to serve again until

the full end and term of four years. *Id.* art. XXVIII, *reprinted in 6 Thorpe 3248, 3254*. No person was eligible to serve as sheriff in any district unless he had resided therein for two years prior to the election. *Id.*

Certain specified executive officials served two year terms, and none of these officers who had served for four years was eligible to serve again until the full end and term of four years. *Id.* art. XXIX, *reprinted in 6 Thorpe 3248, 3254*.

13. Virginia

A. The Constitution of Virginia, 1776

This constitution provided that in order that members of legislative and executive departments of the state are restrained from oppression, by feeling and participating in the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies supplied by frequent, certain and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct. Va. Const. of 1776, pt. 1, § 5, *reprinted in 7 Thorpe 3812, 3813*.

No one person could exercise, at the same time, the powers of more than one of the three departments of state, the legislative, executive, and judiciary departments; except that justices of the county courts were eligible to serve in either house of assembly. *Id.* pt. 2, *reprinted in 7 Thorpe 3812, 3815*.

Representatives of a county or district to the house of delegates were chosen from the men who actually resided in, and were freeholders of, the county or district, or those who were duly qualified according to law. *Id.* pt. 2, *reprinted in 7 Thorpe 3812, 3815-16*.

Senators for a particular district were chosen from persons who were actually residents and freeholders within the district, or were duly qualified according to law, and

were upwards of 25 years of age. *Id.* pt. 2, reprinted in 7 Thorpe 3812, 3816.

A person could not serve as governor longer than three successive one year terms, and was not eligible for another term until four years after leaving that office. *Id.*

At the end of every three years, two members of the privy council were removed from office by joint ballot of both houses of the assembly and were ineligible for a seat on the council for the next three years. *Id.* pt. 2, reprinted in 7 Thorpe 3812, 3817.

Delegates for Virginia to the Continental Congress were chosen annually, or superseded in the meantime, by joint ballot of both houses of assembly. *Id.* pt. 2, reprinted in 7 Thorpe 3812, 3817.

APPENDIX C

State-imposed Qualifications on Members of Congress Through the 19th Century

[The following is reprinted from a report by Rep. R.T. Bennett, found in William H. Mobley, *Digest of Contested Election Cases* 88-99 (1889).]

Provisions in the constitutions of the original thirteen States prescribing qualifications of members of Congress, judges, etc., and extracts from the laws thereof touching the same subject-matter:

Connecticut

This State was first divided into Congressional districts in 1835. In that act it was provided that Representatives must reside in the districts represented.

Delaware

1792. Article 3, section 8 of the constitution of that date declares that—

No member of Congress, nor any person holding or exercising any office under the United States, shall at the same time, hold or exercise the office of judge, etc.

Article 2, section 12 of the same constitution provides that—

No member of Congress, nor any person holding any office under this State or the United States, shall, during their continuance in Congress, or in office, be a senator or representative.

The same is in the constitution of 1831. In the latter, article 5, section 2, it is provided in respect to judges—

But they shall hold no other office of profit, etc.

The legislature of Delaware in 1778, and also in 1790, declared—

That every person coming to vote for a Representative, agreeably to the directions of this act, shall deliver in writing on one ticket, or piece of paper, the names of two persons, inhabitants of this State, one of whom at least shall not be an inhabitant of the same county with himself, to be voted for as Representative.

Georgia

Constitution of 1789, article 2, section 5:

The governor shall, at stated times, receive for his services a compensation which shall neither be increased or diminished during the period for which he shall be elected. Neither shall he receive, during that period, any other emolument for the United States or any of them, or any foreign power.

In 1798 it was provided as follows (article 1, § 11):

No person holding a military commission or other appointment having any emolument or compensation annexed thereto, under this State or the United States * * * shall have a seat in either house of the general assembly; * * * nor shall any member, after having taken his seat, be eligible to any of the aforesaid offices or appointments during the time for which he shall have been elected.

By act of the legislature, February 11, 1799, Georgia declared:

No person shall be a Representative in Congress who shall not have been an inhabitant of the State three years next preceding his election, and paid his tax regularly during that time; nor shall he hold any office of profit under the State or the United States during the time for which he may be elected a Representative.

Section 2 of the same law provided that the governor shall not issue a certificate until satisfactory proof is given by the member elect of residence and payment of tax.

Section 46. No person shall be eligible to represent any of said congressional districts who does not, at the time of his election, reside within said district.

The Revised Code of Georgia of 1867, section 1326, declared that—

Besides the qualifications required by the constitution, a residence of one year next preceding the day of election, in the district where the candidate offers himself, is necessary to make him eligible to election.

Maryland

In 1776, in her bill of rights, Maryland declared as follows:

The independency and uprightness of judges are essential to the impartial administration of justice * * * wherefore no chancellor or judge ought to hold any other office, civil or military, or receive fees or perquisites of any kind.

Sec. 32. No person ought to hold, at the same time, more than one office of profit from this State or the United States, without the approbation of this State.

(Re-adopted in 1851, 1864, and 1867)

In the constitution of 1792 was this provision, viz:

That no member of Congress, or person holding any office of trust or profit under the United States, shall be capable of holding a seat in the general assembly, or of being an elector of the senate.

Article 33 of the constitution of 1864 contains the following:

No judge shall hold any other office, civil or military, or political trust or employment of any kind whatsoever, under the constitution or laws of this State, or of the United States, or any of them.

In 1788 the legislature of Maryland passed an act providing—

That every person coming to vote for Representative for the State in Congress * * * shall have a right to vote for six persons, one of whom shall be a resident of each of said districts; and the candidate in each district having the greatest number of votes of all the candidates residing in that district shall be declared to be elected for that district.

It was provided by an act of the legislature in 1790 that—

Every person entitled and offering to vote for Representative in Congress shall have the right to vote for one person, being a resident of his district at the time of the election, and having resided therein twelve calendar months immediately before, and otherwise qualified according to the Constitution of the United States.

When Maryland was divided into eight districts with nine members, in 1802, the act provided that—

The fifth district shall elect two members, one of whom shall be a resident of Baltimore City, and the other of Baltimore County.

(This law is in the revision of 1819.)

The code of 1860, section 74, contains the following:

One the United States Senators shall be always an inhabitant of the eastern, and the other of the western shore.

Massachusetts

Constitution of 1780, article 2, chapter 6:

No governor, lieutenant-governor, or judge of the supreme court shall hold any other office or place except such as by the constitution they are entitled to hold; nor

shall they hold any other place or office from any other State or Government or power whatever.

(This provision is still in the constitution of Massachusetts.)

In 1788 the legislature of Massachusetts passed a law dividing the State into Congressional districts. This law provided that—

One Representative, being an inhabitant of the district for which he shall be elected, shall be chosen in the manner hereinafter described.

(This was the law of 1790, and also of 1794.)

In 1802 the State was divided into seventeen districts, and the same law provided for a member in each district, "being an inhabitant of the district for which he shall be elected."

This feature has been re-enacted in every apportionment in Massachusetts since that date, making residence in the district an additional qualification for a Representative in Congress.

For Presidential electors, the voters in Massachusetts are required by law to vote for one in each Congressional district on a general ticket.

A statute of Massachusetts makes bribery, embezzlement, conviction of felony, or other infamous crime a disqualification for holding any office under the State. This undoubtedly applies to members of Congress and Presidential electors.

New Hampshire

Bill of rights, part 2, section 92:

No governor or judge of the supreme court shall hold any office or place under the authority of this State except such as by this constitution they are admitted to hold:

nor shall they hold any place or office from any other State, Government, or power whatever.

New Jersey

Constitution of 1776, section 20:

None of the judges of the supreme court or other courts shall be eligible to a seat in the general assembly.

The constitution of 1844, article 5, section 8, provides that—

No member of Congress or person holding office under the United States or this State shall exercise the office of governor.

The latter clause was amended by the constitution of 1875, article 7, section 2, to read as follows:

Nor shall he be elected to any office under the government of this State or the United States during the term for which he shall have been elected.

When New Jersey first divided the State into live Congressional districts it was provided in section 4 of the act that there should be elected for the State—

One person in each of the said districts to be a member of the House of Representatives who shall be a citizen of the United States of the age of twenty-five years or upwards, and an inhabitant of the district in which he shall be elected, and who shall have been a citizen of the United States seven years next preceding said election.

New York

Constitution of 1777, section 25:

The chancellor and judges of the supreme court shall not at the same time hold any office except that of delegate to the General Congress upon special occasions.

Article 1, section 11, of the constitution of 1821 provides that—

No person, being a member of Congress or holding any judicial office under the United States shall hold a seat in the legislature.

Section 10 is in these words:

No member of the legislature shall receive any civil appointment from the governor and senate or from the legislature during the term for which he shall have been elected.

(Re-adopted in 1846.)

Article 6, section 8, of the constitution of 1821 contains the following in reference to judges:

They shall not hold any other office of public trust. All votes for them for any other office * * * given by the legislature or the people shall be void.

The constitution of 1869 declares that—

The judges of the court of appeals and the justices of the supreme court shall not hold any other office or public trust. All votes for any of them for any other than a judicial office given by the legislature or the people shall be void.

North Carolina

Declaration of rights, part 4:

The legislative, executive, and supreme judicial power of government ought to be forever separate and distinct from each other.

Constitution of 1776, part 35:

No person in this State shall hold more than one lucrative office at any one time.

(Not amended until 1835.)

Article 6, section 1, of the constitution of 1868 required a residence of twelve months for a voter, and

section 4 provided that only qualified voters shall be eligible to office. By section 2, article 14, persons fighting a duel are declared to be ineligible to any office. (This was substantially re-adopted in the constitution of 1878.)

An act of the legislature of North Carolina in 1792 contains the following:

And whereas it is necessary to keep separate and distinct the offices of the Federal Government from those of the State government, be it further enacted that no citizen of this State shall hold at one and the same time any office of trust, profit, or emolument under the authority of the United States and any office or authority, either civil or military, under the authority of this State. Senators and Representatives in Congress are considered as coming within the purview of this law.

In 1802 the State was divided into twelve districts, and the act declared that—

The person elected in each district shall be a resident or inhabitant of that district for which he is elected during the space or term of one year before and at the time of his election.

Pennsylvania

Constitution of 1790, article 1, section 18:

No representative shall during the time for which he shall have been elected to any office in this State, and no member of Congress or other person holding any office under the United States or this State, shall be a member of either house during his continuance in Congress or in office.

Article 5, section 1, referring to judges (re-enacted in 1838):

But they shall receive no fees or perquisites of office, nor hold any other office of profit under this Commonwealth.

This was amended in 1850 to read as follows:

Nor hold any other office of profit under this Commonwealth, or under the Government of the United States, or any other State of the Union.

The new constitution of 1873 contains these words:

Nor hold any other office of profit under the United States, this State, or any other State.

Rhode Island

This State adopted her first constitution in 1842. Article 2, section 1, requires as a qualification for suffrage one year's residence and real estate of the value of \$134 above all encumbrances.

Article 9, section 1, provides that—

No person shall be eligible to any civil office * * * unless he be a qualified elector for such office.

South Carolina

Constitution of 1778, article 8:

No person in this State shall hold the office of governor thereof, or lieutenant-governor, and any other office or commission, civil or military, * * * either in this or any other State, or under the authority of the Continental Congress, at one and the same time.

Article 1, section 21, of the constitution of 1790 declares that—

No person shall be eligible to a seat in the legislature whilst he holds any office of profit or trust under this State, the United States, or either of them.

Article 3, section 1:

The judges shall hold their commissions during good behavior, * * * nor hold any office of trust or profit in this State, the United States, or any of them.

In 1865 this clause was amended to read:

Nor hold any other office of profit or trust under this State, the United States of America, or any other power.

(Readopted in 1868.)

Virginia

Constitution of 1830, article 2:

The legislative, executive, and judiciary departments shall be separate and distinct, * * * nor shall any person exercise the power of more than one of them at the same time.

Article 5, section 1:

The judges of the supreme court of appeals and of the superior court shall hold their offices during good behavior, * * * and shall, at the same time, hold no other office, appointment, or public trust.

The constitution of 1850, article 15, section 15, provides that—

No judge, during this term of service, shall hold any other office, appointment, or public trust, and the acceptance thereof shall vacate his judicial office; nor shall he, during such term or within one year thereafter, be eligible to any political office he, during such term or within one year thereafter, be eligible to any political office.

(Re-adopted in 1864.)

Article 6, section 24 of the constitution of 1870, provides that:

Judges of the supreme court of appeals and judges of the circuit courts shall not hold any other office or public trust during their continuance in office.

The legislature of Virginia, composed of the same men who ratified the Federal Constitution, passed a law dividing the State into ten districts, declaring that:

The persons qualified by law to vote for members of the house of delegates in each county composing a district, shall assemble at their respective county court-houses on the second day of February next, and then and there vote for some discreet and proper person, being a freeholder, and who shall have been a bona fide resident for twelve months within said district, as a member to the House of Representatives for the United States.

(The same provision is in the act of December 26, 1799, making a new apportionment of nineteen members.)

Constitutions Of Other States

The following are the provisions in the constitutions of the other States respecting qualifications of members of Congress, etc.

Alabama

Constitution of 1819, article 5, section 11:

Judges of the supreme and circuit courts, and courts of chancery, shall, at stated times, receive for their services a compensation, which shall be fixed by law, and shall not be diminished during their continuance in office; but they shall receive no fees or perquisites of office, nor hold any other office of profit or trust under this State, the United States, or any other power.

The constitution of 1850, article 5, section 10, provides that—

The judges of the supreme court, circuit courts, and courts of chancery shall, at stated times, receive for their services a compensation which shall be fixed by law, and which shall not be diminished during their continuance in office, but they shall receive no fees or perquisites of office, nor hold any office of profit or trust under this State, the United States, or any other power.

This was amended in 1867 to read:

Nor hold any office (except judicial offices) of profit or trust under this State, or the United States, during the term for which they have been elected, nor under any power during their continuance in office.

(The same provision is in the constitution of 1875.)

Arkansas

Constitution of 1836, article 5, section 5, under the head of "executive," provides as follows:

He shall, at stated times, receive a compensation for his services which shall not be increased or diminished during the term for which he shall have been elected, nor shall he receive within that period any other emolument from the United States, or any of them, or from any other power.

(Same in constitution of 1864.)

In article 6, section 8, of the constitution of 1836 is the following in relation to judges of the supreme and circuit courts (retained in the constitution of 1861):

Nor hold any other office of trust or profit under this State or the United States.

The constitution of 1868 has the following:

The officers of the executive department and judges of the supreme court shall not be eligible, during the period for which they may be elected or appointed to their respective offices, to any position within the gift of the qualified electors or of the general assembly of the State.

The constitution of 1874 declares, in reference to supreme court judges:

Nor hold any other office of trust or profit under this State or the United States.

California

Constitution of 1849, article 6, section 16.

The justices of the Supreme Court and district judges shall be ineligible to any other office during the term for which they shall have been elected.

In 1862 this was amended to read as follows:

The justices of the Supreme Court and district judges and the country judges shall be ineligible to any other office during the term for which they shall have been elected.

Colorado

Constitution of 1876, article 5, section 8:

No senator or representative shall during the time for which he shall have been elected, be appointed to any civil office under this State; and no member of Congress or other person holding any office (excepting attorney at law, notary public, or the militia) under the United States or this State, shall be a member of either house during his continuance in office.

(It is provided also in this Constitution that no person shall hold any office who is not a qualified voter.)

Florida

1838. Article 5, section 5:

* * * But the judges shall receive no fees or perquisites of office, not hold any other office or profit or trust under this State, the United States, or any other power.

In the constitution of 1865 are these words:

Nor hold any other office of profit or trust under this State, the United States, or any other power.

The constitution of 1868, article 17, section 23, provides that—

The governor, or any other State officer, is hereby prohibited from giving certificates of election, or other credentials, to any person having been elected to the House of Representatives of the United States Congress or the United States Senate who has not been two years a citizen of the State and nine years a citizen of the United States, and a resident voter.

Illinois

1818. Article 2, section 25:

No judge of any court of law or equity * * * member of either House of Congress * * * shall have a seat in the general assembly.

Constitution of 1848, article 6, section 7:

No person shall be elected or appointed to any office in this State, civil or military, * * * who shall not have resided in this State one year next before his election or appointment.

Section 10 provides that—

The judges of the supreme and circuit courts shall not be eligible to any other office of public trust or profit in this State or the United States during the term for which they are elected, nor for one year thereafter. All votes for either of them for any elective office * * * given by the general assembly or the people shall be void.

Indiana

1857. Article 7, section 15:

No person elected to any judicial office shall, during the term for which he shall be elected, be eligible to any office of trust or profit under the State, other than a judicial office.

Iowa

1816. Article 5, section 3:

The judges of the supreme court shall be ineligible to any other office in the State during the term for which they shall have been elected.

Under the constitution of the same date the district judges were declared to be "ineligible to any other office, except that of supreme judge, during the term for which they shall have been elected." And in the constitution of 1851 it is provided that—

The judges of the supreme court shall be ineligible to any other office during the term for which they shall have been elected.

Kansas

Topeka constitution of 1855. In reference to judges—

Nor hold any other office of profit or trust under the State, other than a judicial office.

The Lecompton constitution of 1857 contained the following on the same subject:

Nor hold any other office of profit or trust under this State, the United States, or either of the other States, or any power, during their continuance in office.

In the Leavenworth constitution of 1858 is this provision:

Nor hold any office of profit or trust under the State, other than a judicial office.

The Wyandotte constitution of 1859, under which Kansas was admitted into the Union, provides as follows in reference to judges:

Nor hold any other office of profit or trust under the authority of the State or the United States, during the term of office for which such justices and judges shall be elected.

Kentucky

1792. Article 1.

No member of Congress or other person holding any office of profit or trust under the United States or this Commonwealth * * * shall be a member of the House during his continuance to act as a member of Congress or in such office.

In the constitution of 1850 is the following:

No member of Congress, or person holding or exercising any office of trust or profit under the United States or either of them, or under any foreign power, shall be eligible as a member of the general assembly of this Commonwealth, or hold or exercise any office of trust or profit under the same. (Art. 8, sec. 25.)

Louisiana

1812. Article 6, section 14 (re-adopted in the constitutions of 1845, 1852, and 1864):

No member of Congress, or person holding or exercising any office of profit or trust under the United States, or either of them, or under any foreign power, shall be eligible as a member of the general assembly of this State, or hold or exercise any office of trust or profit under the same.

Article 39, title 3, of the constitution of 1852 provides (re-adopted in 1864 and 1868):

No member of Congress or person holding any office under the United States, shall be eligible to the office of governor or lieutenant-governor.

The constitution of 1868 declares that—

No person shall hold or exercise at the same time, more than one office of trust or profit, etc.

Maine

1820. Article 4, part 3, section 11:

No member of Congress or person holding any office under the United States, or office of profit under this State, shall have a seat in either house during his being such member of Congress, or his continuing in such office.

Article 5, section 5:

No person holding any office or place under the United States, this State, or any other power, shall exercise the office of governor.

Article 6, section 6:

The justices of the supreme judicial court shall not hold any office under the United States, nor any State, nor any other office under this State, except that of justice of the peace.

Michigan

1833. Article 6, section 2 (referring to judges):

But they shall receive no fees * * * nor hold any office or profit or trust under the authority of this State or the United States.

The constitution of 1850 provides as follows:

No person elected a member of the legislature shall receive any civil appointment within this State, or to the Senate of the United States, from the governor, the governor and senate, from the legislature, or any State authority, during the term for which he is elected or appointed, and all votes given for any person so elected or appointed shall be void. (Art. 4, sec. 18.)

But no judge of the supreme court or circuit court shall exercise any other power or appointment to public office. (Art. 6, sec. 10.)

Minnesota

1857. Article 6, section 11:

The justices of the supreme court and the district courts shall hold no office under the United States nor any other office under this State, and all votes for either of them for any elective office under this constitution, except a judicial office, given by the legislature or the people, during their continuance in office, shall be void.

Mississippi

1817. Article 6, section 15:

No member of Congress, nor any person holding any office of profit or trust under the United States, or either of them * * * or under any foreign power, shall hold or exercise any office of profit or trust under this State.

(Re-adopted in 1832 and 1868.)

Missouri

1820. Article 3, section 11:

No judge of any court of law or equity * * * member of Congress, or other person holding any lucrative office under the United States or this State, * * * shall be eligible to either house of the general assembly.

The constitution of 1822, article 1, section 4, declares that—

No person holding an office of profit under the United States and commissioned by the President, shall, during his continuance in such office, be eligible, appointed, hold, or exercise any office of profit under this State.

By the constitution of 1865, article 4, section 11, it is provided—

That no member of Congress, or person holding any lucrative office under the United States, * * * shall be eligible to either house of the general assembly.

(Re-adopted in 1875.)

Article 8, section 12, of the constitution of 1875, says:

No person shall be elected or appointed any office in this State, civil or military, who is not a citizen of the United States and who shall not have resided in this State one year next preceding his election or appointment.

Nebraska

1866-67. Article 2, section 14:

No person, being a member of Congress, or holding any military or civil office under the United States, shall be eligible to a seat in the legislature.

The same constitution declares that—

No person holding office under authority of the United States * * * shall be eligible to have a seat in the legislature. (Art. 3, sec. 6.)

No person elected to the legislature shall receive any civil appointment within this State from the governor and senate during the term for which he has been elected. (Art. 3, sec. 13.)

Nevada

1864. Article 4, section 9:

No person holding any lucrative office under the Government of the United States, or any other power, shall be eligible to any civil office of profit under this State.

Article 6, section 11:

Justices of the supreme court and the district judges shall be ineligible to any office, other than a judicial office, during the term for which they shall have been elected; and all elections or appointment of any such judges, by the people, the legislature, or otherwise, during said period, shall be void.

Ohio

1802. Article 3, section 8 (concerning the judges):

But they shall receive no fees or perquisites of office nor hold any other office of profit or trust under the authority of this State or the United States.

The constitution of 1851 contains the following:

Nor hold any other office of profit or trust under the authority of this State or the United States. All votes for either of them for any elective office, except a judicial office, under the authority of this State, given by the general assembly or the people, shall be void.

Oregon

1857. Article 2, section 9:

Every person who shall give or accept a challenge to fight a duel, or shall knowingly carry to another person such challenge, or who shall agree to go out of the State to fight a duel, shall be ineligible to any office of trust or profit.

Section 10:

No person holding a lucrative office or appointment under the United States or this State shall be eligible to a seat in the general assembly; nor shall any person hold more than one lucrative office at the same time, except as in this constitution expressly provided.

Article 7, section 21:

Every judge of the supreme court, before entering upon the duties of his office, shall take and subscribe and transmit to the secretary of state the following oath: "I, _____, do solemnly swear . . . that I will not accept any other office, except judicial offices, during the term for which I have been elected."

Texas

1845. Article 7, section 13:

No member of Congress, nor person holding or exercising any office of profit or trust under the United States or either or them, or under any foreign power, shall be eligible as a member of the legislature, or hold or exercise any office of profit or trust under this State.

Sec. 26: No person shall hold office or exercise, at the same time, more than one civil office of employment.

(Re-adopted in 1870.)

Tennessee

1796. Article 5, section 3:

The judges of the supreme court shall at stated times receive a compensation for their services, to be ascertained by law, and shall not be allowed any fees or perquisites of office, nor shall they hold any other office of trust or profit under this State or the United States.

(This was re-adopted in the constitutions of 1834 and 1870.)

Vermont

1786. Chapter 2, section 27:

No person who holds any office in the gift of Congress shall, during the time of his holding such office, be elected to represent this State in Congress.

The constitution of 1793, Article 2, section 26, provides that—

No person in this State shall be capable of holding or exercising more than one of the following offices at the same time, viz: Governor, Lieutenant governor, judges of the supreme court; . . . nor shall any person holding any office of profit or trust under the authority of Congress be eligible to any appointment in the legislature or of holding any executive or judicial office under this State.

West Virginia

1861-63. Article 6, section 12:

No judge, during his term of office, shall hold any other office, appointment, or public trust under this or any other government, and the acceptance thereof shall vacate his judicial office; nor shall he, during his continuance therein, be eligible to any political office.

Wisconsin

1848. Article 13, section 3:

No member of Congress, nor any person holding any office of profit or trust under the United States . . . or under any foreign power, no person convicted of any infamous crime in any court within the United States, and no person being a defaulter to the United States, or to this State, or to any county or town therein, or to any State or Territory within the United States, shall be eligible to any office of trust, profit, or honor in this State.

APPENDIX D**Contemporary Term Limits on Governors
or Executive Officers**

The following states do not impose term limits on their legislators or members of Congress, but they do limit the terms of the governor or other state officials in the executive branch:

<i>State</i>	<i>Constitutional Provision</i>
Alabama	Ala. Const. art. V, § 116 (1901 & Supp. 1993) (governor, lieutenant governor, attorney general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries cannot succeed himself or herself) ¹
Alaska	Alaska Const. art. III, § 5 (1993) (governor who has served two consecutive terms may not run until one term has intervened)
Delaware	Del. Const. art. III, § 5 (1897 & Supp. 1992) (governor may not serve third term)
Georgia	Ga. Const. art. V, § 1, ¶ 1 (1982 & Supp. 1994) (governor limited to two consecutive terms, but may run after one term has intervened)
Hawaii	Hawaii Const. art. V, §§ 1, 2 (1985 & Supp. 1993) (governor and lieutenant governor can serve no more than two consecutive terms)

¹ Under this same constitutional provision, the governor of Alabama is not eligible for the United States Senate during his or her term, nor within one year after the expiration thereof. That provision appears to impose an additional qualification for federal office.

Indiana	Ind. Const. art. V, § 1 (1851 & Supp. 1994) (governor may not serve more than eight years in any period of 12 years)
Kansas	Kansas Const. art. I, § 1 (1859 & Supp. 1993) (no more than two successive terms as governor or lieutenant governor)
Kentucky	Ky. Const. § 71 (1891 & Supp. 1992) (governor ineligible for succeeding four years after the expiration of current term); § 82 (same for lieutenant governor); § 93 (same for treasurer, auditor of public accounts, secretary of state, commissioner of agriculture, labor, and statistics, attorney general, superintendent of public instruction, and register of the land)
Louisiana	La. Const. art. 4, § 3(B) (1974 & Supp. 1994) (governor cannot serve term following two successive terms)
Maryland	Md. Const. art. II, § 1 (1867 & Supp. 1993) (governor cannot serve term following two consecutive terms)
Mississippi	Miss. Const. art. V, § 116 (1890 & Supp. 1993) (governor cannot be his or her own immediate successor)
Nevada	Nev. Const. art. 5, § 3 (1864 & Supp. 1993) (no person can be elected governor more than twice)
New Jersey	N.J. Const. art. 5, § 1, ¶ 5 (1947 & Supp. 1994) (governor must let term intervene after serving two consecutively)

New Mexico	N.M. Const. art. V, § 1 (1911 & Supp. 1994) (governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general, and commissioner of public lands who have served two consecutive terms cannot serve again until one full term has intervened); see also art. X, § 2 (same term limits for county officers)
North Carolina	N.C. Const. art. III, § 2(2) (1970 & Supp. 1993) (neither governor nor lieutenant governor can serve more than two consecutive terms of same office)
Pennsylvania	Penn. Const. art. IV, § 3 (1874 & Supp. 1994) (governor eligible to succeed himself or herself for one additional term)
Rhode Island	R.I. Const. art. IV, § 1 (1986 & Supp. 1993) (governor, lieutenant governor, secretary of state, attorney general, general treasurer cannot serve consecutively in same general office for more than two full terms)
South Carolina	S.C. Const. art. IV, § 3 (1895 & Supp. 1993) (governor cannot serve more than two consecutive terms)
Tennessee	Tenn. Const. art. 3, § 4 (1870 & Supp. 1993) (governor can serve no more than two consecutive terms)
Virginia	Va. Const. art. V, § 1 (1971 & Supp. 1994) (governor cannot serve consecutive terms)
West Virginia	W.V. Const. art. VII, § 1 (1872 & Supp. 1994) (governor cannot serve more than two consecutive terms)

APPENDIX E

Contemporary Term Limits for the Governor, the State Legislature, and Members of the United States Congress

In addition to Arkansas, the following states have imposed term limits on their governors, state legislators, and members of Congress.

<i>State</i>	<i>Constitutional or Statutory Provision</i>
Arizona	Ariz. Const. art. V, § 1 (1910 & Supp. 1993) (governor, secretary of state, state treasurer, attorney general, and superintendent of public instruction cannot serve more than two consecutive terms); art. IV, pt. 2 § 21 (no state senator nor any state representative shall serve more than four consecutive terms in one office); art. VII, § 18 (U.S. Senate candidates from Arizona cannot have name on ballot if they have served two consecutive terms; U.S. House candidates cannot have name on ballot if they have served three consecutive terms). For all term limits, only terms after January 1, 1993, will be considered. Candidates ineligible for an election or ballot appearance because of term limits may run again for the same office only if one full term has intervened.
California	Calif. Const. art. V, § 2 (1879 & Supp. 1994) ("No Governor may serve more than two terms"); art. V, § 11 ("No Lieutenant Governor, Attorney General, Controller, Secretary of State, or Treasurer may serve in the same office for more than two terms"); art. IV, § 2 (no

state senator may serve more than two four-year terms; no member of the state assembly may serve more than three two-year terms); Cal. Elections Code Ann. § 25003 (1961 & Supp. 1994) (restricting access to ballot of any candidate for U.S. Representative who has served in the House for six of the previous 11 years and any candidate for U.S. Senate who has served in the Senate for 12 of the past 17 years).

Colorado	Colo. Const. art. IV, § 1 (1973 & Supp. 1993) (governor, lieutenant governor, secretary of state, state treasurer, and attorney general cannot serve more than two consecutive terms in the same office); art. V, § 3 (state senators cannot serve more than two consecutive terms in the senate, and state representatives cannot serve more than four consecutive terms in the house); art. XVIII, § 9a (no U.S. Senator from Colorado shall serve more than two consecutive terms in the Senate, and no U.S. Representative shall serve more than six consecutive terms in the House). All of the above term limits apply only to terms beginning on or after January 1, 1991, and are considered consecutive unless they are four years apart.
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Florida	Fla. Const. art. IV, § 5 (1968 & Supp. 1994) (no person who has served as governor for more than six years in two consecutive terms shall be elected governor for the succeeding term); ¹ art. VI,
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¹ The 1885 and 1938 Florida constitutions limited the governor to only one four-year term, although the governor could run again

§ 4(h) (no person may appear on the ballot for re-election to any of the following offices if, by the end of the current term of office, the person will have served in that office for eight consecutive years: state representative, state senator, lieutenant governor, any office of the Florida cabinet, U.S. Representative, or U.S. Senator).

Michigan

Mich. Const. art. V, § 30 (1963 & Supp. 1994) (no person shall be elected more than twice to each of the following offices: governor, lieutenant governor, secretary of state, or attorney general); art. IV, § 54 (state representatives may not serve more than three times; state senators may not serve more than twice); art. II, § 10 (U.S. Representatives may not serve more than three times in any 12-year period; U.S. Senators may not serve more than two times in any 24-year period). All of these term limits count only terms beginning on or after January 1, 1993.

Missouri

Mo. Const. art. IV, § 17 (1945 & Supp. 1994) (no person shall be governor or treasurer twice); art. III, § 8 (no one shall be elected or appointed to serve more than eight years total in any one house of the General Assembly, nor more than 16 years total in both houses of the General Assembly); art. III, § 45 (a) (no U.S. Senator from Missouri shall serve more than two terms in the Senate; no U.S. Representative shall

if one full term had intervened, Fla. Const. art. IV § 5 (commentary) (1968 & Supp. 1994).

serve more than four terms in the House. Section 45(a) becomes effective whenever at least one-half of the states enact term limits for their members of Congress).

Montana

Mont. Const. art IV, § 8 (1889 & LEXIS 1994) (governor and state legislators limited to eight years in any 16-year period; U.S. Representatives limited to six years in any 12-year period; U.S. Senators limited to 12 years in any 24-year period).

Nebraska

Nebr. Const. art. IV, § 1 (1875 & Supp. 1993) (governor limited to two terms); art. IV, § 3 (lieutenant governor, secretary of state, auditor of public accounts, treasurer, attorney general, and members of the public service commission are ineligible to file for reelection and ineligible to serve in their respective offices "for a number of years equal to the term for which they were last elected next after the expiration of the second of two consecutive terms for which they were previously elected after the general election"); art. III, § 8 ("No person shall be eligible to file for election to or to serve as a member of the Legislature for a period of four years after the expiration of the second of two consecutive terms for which they were previously elected"); art. XV, § 20 (U.S. Representative may not appear on the ballot to seek a fifth consecutive term; U.S. Senator may not appear on the ballot for a third consecutive term; neither may be listed on an official ballot for a period of years equal

to the number of years in the term for which that person was last elected as a Representative in Congress or as a Senator).²

Ohio

Ohio Const. art III, § 2 (1851 & Supp. 1993) (governor, lieutenant governor, secretary of state, treasurer of state, attorney general and auditor of state shall not hold office longer than two successive terms of four years; for all officers except the governor, only terms beginning on or after January 1, 1995, count); art. II, § 2 (no person shall hold the office of state senator for a period of longer than two consecutive terms of four years; no person shall hold the office of state representative for a period of longer than four successive terms of two years; only terms beginning on or after January 1, 1993, will be considered); art. V, § 8 (U.S. Senators limited to two successive terms; U.S. Representatives limited to four successive terms; terms considered successive unless four years have intervened; and only terms beginning January 1, 1993, are considered).

Oregon

Ore. Const. art V, § 1 (LEXIS 1994) (governor limited to eight years in a 12-year period); art. II, § 19 (members of Oregon legislative assembly limited to serving 12 years; Oregon senators and holders of statewide office limited to serving eight years; members of Oregon house limited to six years); art. II, § 20

² The amendments to the Nebraska Constitution imposing term limits were recently invalidated due to a defect in the initiative process. *Duggan v. Beermann*, 515 N.W.2d 788 (Neb. 1994).

(U.S. Representatives limited to serving six years; U.S. Senators limited to serving 12 years).

South Dakota

S.D. Const. art. IV, § 2 (1889 & Supp. 1994) (no person shall be elected to more than two consecutive terms as governor or as lieutenant governor); art. IV, § 7 (beginning with 1992 election, no person may be elected to more than two consecutive terms as attorney general, secretary of state, auditor, treasurer, or commissioner of school and public lands); art. III, § 6 (no person may serve more than four consecutive terms or a total of eight consecutive years in the state senate or house of representatives; this restriction does not apply to terms before January 1, 1993); art. IV, § 32 (commencing with 1992 election, no person may be elected to more than two consecutive U.S. Senate terms nor more than six consecutive U.S. House terms).

Washington

Wash. Rev. Code Ann., § 43.01.015 (1984 & Supp. 1994) (no person is eligible to appear on the ballot or file a declaration of candidacy for governor or lieutenant governor if he or she has served in the same office for eight of the previous 14 years); § 44.04.015 (no person is eligible to appear on the ballot or file a declaration of candidacy if he or she is one of the following: (i) a state house of representatives candidate who has served in the house during six of the previous 12 years; (ii) a state senate candidate who has served in the senate eight of the previous 14 years; (iii) a

candidate for the legislature who has served as a member of the legislature for 14 of the past 20 years); § 28.68.015 (no person is eligible to appear on the ballot or file a declaration of candidacy for the U.S. House if he or she has served in the U.S. House for six of the previous 12 years); § 28.68.016 (no person is eligible to appear on the ballot or file a declaration of candidacy for the U.S. Senate if he or she has served in the Senate for 12 of the previous 18 years).

Wyoming

Wyo. Stat. Ann., § 22-5-103 (1977 & Supp. 1993) (candidate may not be elected or serve in same office if (i) he or she has served eight or more years in any 16 years in the office of governor, secretary of state, state auditor, state treasurer, and state superintendent of public instruction; (ii) he or she has served six years in any 12-year period as state representative; (iii) he or she has served 12 years in any 24-year period as state senator); § 22-5-104 (nomination applications for same office will not be accepted for any person who has served 12 or more years in any 24-year period as U.S. Senator or for any person who has served six or more years in any 12-year period in the U.S. House). All of the term limits count only terms served after January 1, 1993.

APPENDIX F

**States Presently With Term Limits,
but Not for All Positions**

The following states have term limits only for certain positions:

1. Federal term limits:

North Dakota does not limit the terms of its governor or state legislators, but it does restrict its Members of Congress. N.D. Century Code § 16.1-01-13 (1960 & Supp. 1993) (making person permanently ineligible to have name on the ballot for office of U.S. Senator or Representative in Congress "if, by the start of the term for which the election is being held, that person will have served as a United States senator or a representative in Congress, or in any combination of those offices, for at least twelve years").¹

2. State term limits:

Oklahoma does not limit its members of Congress, but it does impose term limits on state officials and legislators. Okla. Const. art. VI, § 4 ("No person shall be elected Governor more than two times in succession"); art. V, § 17A (any member of the state legislature elected after 1990 is eligible to serve no more than 12 years in the state legislature).

3. Term limits for the governor and legislative leaders:

Maine limits the terms of its governor. It does not impose general term limits on state legislators, but it does restrict the terms of the senate president, house speaker, and floor leaders. Maine Const. art. V, § 3 (1983 &

¹ North Dakota also enacted § 16.1-01-13.1, which becomes effective only if § 16.1-01-13 is held unconstitutional and provides that "the disqualification imposed by this section ceases after two years have elapsed since the disqualification last affected that person's eligibility for placement on the ballot."

Supp. 1993) (person who has served two consecutive terms as governor is ineligible to succeed himself or herself); Maine Rev. Stat. § 3-21-A (Supp. 1993) (no more than three consecutive legislative bienniums as president of state senate); § 3-24 (same for senate floor leaders); (§ 3-41-A) (same for speaker of the state house of representatives); § 3-44 (same for house floor leaders).

APPENDIX G

States Without Term Limits for Any State or Federal Officers

The following states currently do not have term limits for any elected officials: Connecticut, Idaho, Illinois, Iowa, Massachusetts, Minnesota, New Hampshire, New York, North Dakota,¹ Texas,² Utah, Vermont, and Wisconsin.

¹ North Dakota, however, does impose term limits on its representatives to Congress.

² The Texas Constitutions of 1845, 1861, and 1866 all limited the governor from serving more than two consecutive terms. That limitation was dropped in 1876. Tex. Const. art. IV, § 4 (Interpretive Commentary) (1876 & Supp. 1994).

APPENDIX H

Municipalities With Term Limits on Local Officers

The following cities have imposed term limits on the mayor, city council members, or other local officials. See Erica Gould, *The Municipal Term Limits Groundswell*, U.S. Term Limits Outlook Series Vol. II, No. 3, at 2-16 (Aug. 1993).

1. ALASKA

Anchorage, Juneau, Ketchikan

2. Arizona

Fountain Hills, Goodyear, Mesa, Phoenix

3. CALIFORNIA

Alameda, Alhambra, Anaheim, Acadia, Chula Vista, Dana Point, Fresno, Hillsborough, Huntington Beach, Irvine, Long Beach, Los Altos, Los Angeles, Merced, Newport Beach, Pacific Grove, Palo Alto, Renondo Beach, Riverside County, Roseville, San Diego, San Francisco, San Jose, San Juan, Bautista, San Leandro, San Luis Obispo, San Mateo, Santa Ana, Santa Barbara, Santa Clara, Santa Cruz, Seal Beach, Stockton, Sunnwale, Vallejo, Villa Park, Watsonville, Yorba Linda

4. COLORADO

Avon, Colorado Springs, Englewood, Fountaun, Frisco, Greenwood Village, Littleton, Vail, Wheat Ridge

5. CONNECTICUT

Stratford

6. DELAWARE

Wilmington

7. FLORIDA

Auburndale, Boynton Beach, Cape Coral, Daytona Beach Shores, Deerfield Beach, Destin, Fort Walton Highland Beach, Jacksonville, Jacksonville Beach, Kenneth City, Maitland, Miami Springs, Neptune Beach, New Port Richey, North Port, Oakland Park, Oldsmar, Orange Park, Palm Bay, Port Orange, St. Petersburg, Satellite Beach, South Pasadena, Tamarac, Tampa, Targon Springs, Venice, Winter Park

8. GEORGIA

Augusta, Atlanta, Savannah, Telfar County

9. HAWAII

Honolulu

10. ILLINOIS

Brookfield, Riverside, Springfield, Wilmette

11. INDIANA

Henry County

12. KANSAS

Mission Hills, Wichita

23. KENTUCKY

Frankfort, Lexington, Louisville

14. LOUISIANA

Berwick, New Orleans, Shreveport

15. MAINE

Augusta, Bangor, Dexter, Falmouth, Mars Hill, Skowhogan, South Portland, Standish, Van Buren

16. MARYLAND

Annapolis, Anne Arundel County, Cecil County, Howard County, Prince George's County, Rockville, University Park

17. MASSACHUSETTS

Methuen, Provincetown, Stow

18. MICHIGAN

Bay City, Cheboygan, East Grand Rapids, Essexville, Hart, Imlay City, Ishpeming, Marquette, Niles, Owosso, Plymouth, Rockwood, South Haven, Whitehall, Yarmouth

19. MINNESOTA

Rochester

20. MISSOURI

Creve Coeur, Jefferson City, Kansas City, Kirkwood

21. MONTANA

Billings, Hardin

22. NEW HAMPSHIRE

Claremont, Conway, Dover, Hooksett

23. NEW YORK

East Rockaway, Glens Falls, Cuba, New York City, Syracuse

24. NORTH DAKOTA

Fargo

25. OHIO

Cincinnati, Euclid, Fairborn, Fairfield, Geneva, Madera, Mayfield Heights, Oberlin, Oxford, Richfield, Sandusky, Tipp City, Upper Arlington

26. OKLAHOMA

Del City, Euclid, Kingfisher, Midwest City, Stillwater

27. OREGON

Baker City, Florence, Hillsboro, Lake Oswego, Milwaukee, Oregon City, Philomath, Seaside, Stayton, Sutherlin, Tigard

28. PENNSYLVANIA

Ferguson, Murrysville, Monroeville, Philadelphia, Plymouth, Upper Providence, Whitemarsh

29. TENNESSEE

Nashville

30. TEXAS

Alvin, Ballinger, Bellaire, Bridge City, Brownfield, Cooper's Cove, Dallas, Del Rio, Denison, Denton, El Paso, Flower Mound, Frisco, Galveston, Garland, Graham, Greenville, Highland Park, Highland Village, Houston, Jasper, Katy, Killeen, Kirby, Laredo, Marble Falls, Mercedes, Nassau Bay, New Braunfels, Pasadena, Pearland, Port Aransas, Rockwall, Rowlett, San Antonio, Seabrook, Sherman, Southlake, Sugar Land, Tyler, University Park, Wichita Falls

31. UTAH

Smithfield

32. WASHINGTON

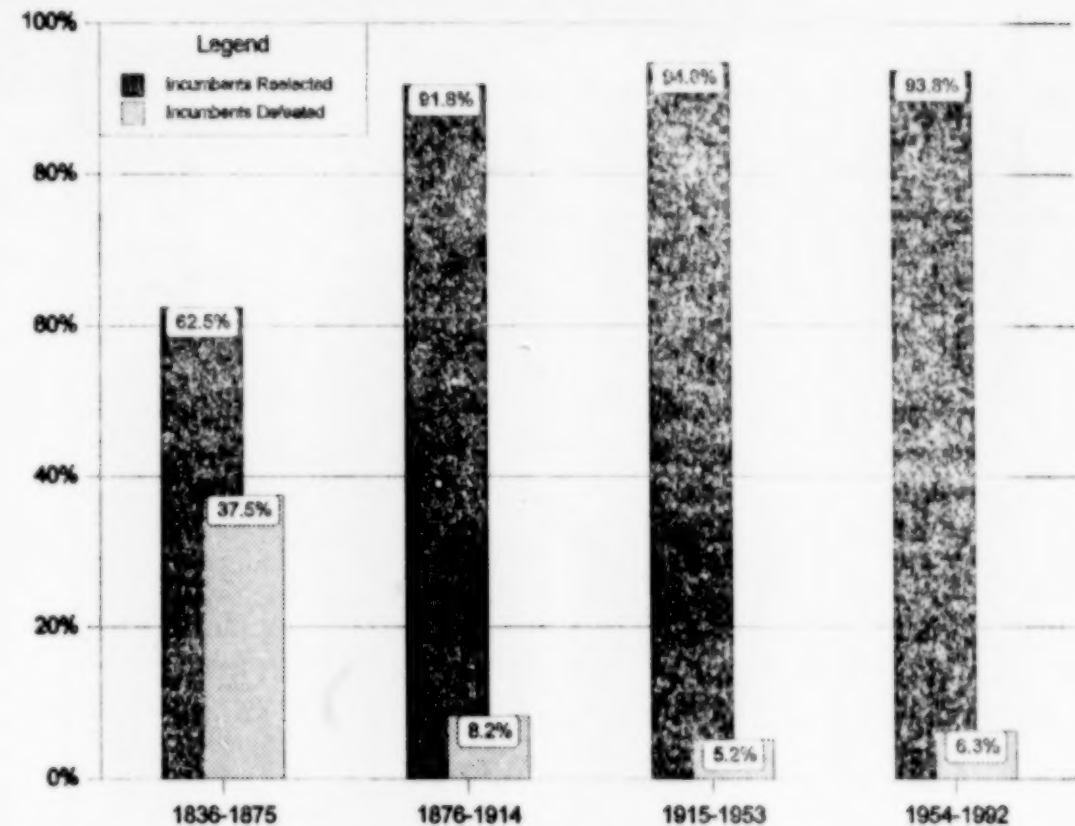
Medina, Port Angeles, Tacoma

33. WEST VIRGINIA

Barboursville

APPENDIX I

Incumbent Reelection Rates of U.S. Representatives from the State of Arkansas Since Statehood

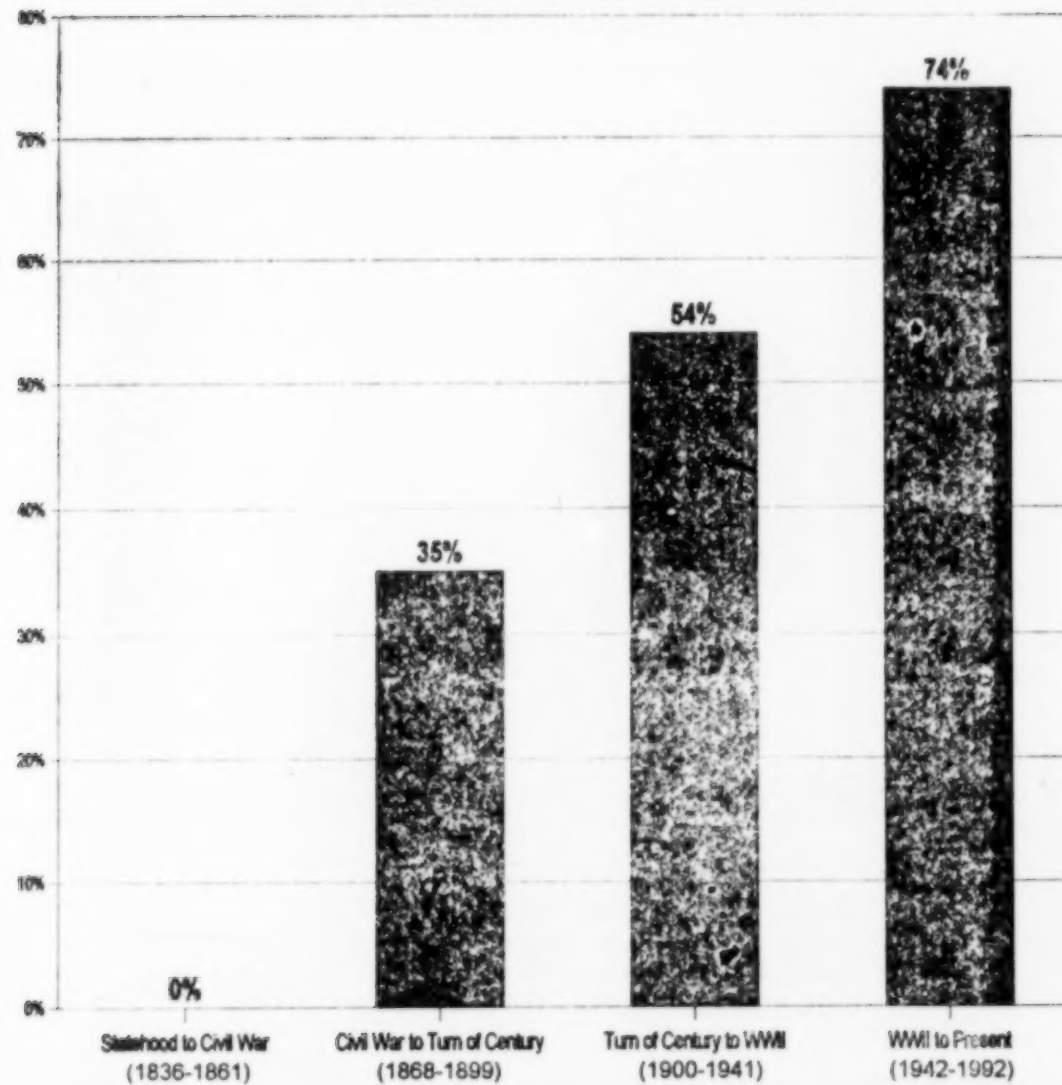


Source: Term Limits Legal Institute from Official Records of the Office of the Secretary of State of Arkansas and *Biographical Directory of the U.S. Congress, 1774-1989*, U.S. Congress Joint Committee on Printing.

Quartile	Ran	Lost	Won
1st: 1836-1875	16	6 (37.5%)	10 (62.5%)
2nd: 1876-1914	97	8 (8.2%)	89 (91.8%)
3rd: 1915-1953	115	6 (5.2%)	109 (94.8%)
4th: 1954-1992	80	5 (6.3%)	75 (93.8%)
Total:	308	25 (8.1%)	283 (91.9%)

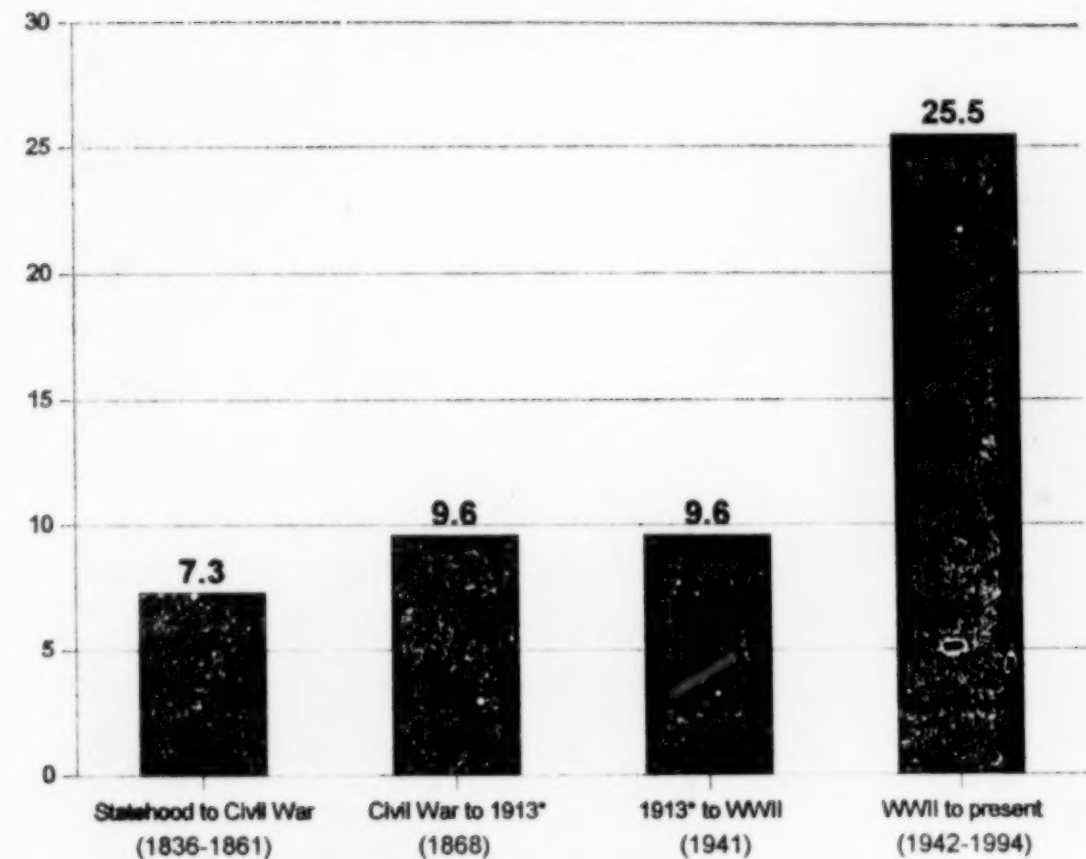
Note: Arkansas' U.S. Senate incumbents have won 90.9% of their races since direct election of senators, having lost only twice in primaries. *Not one has lost a general election.*

**Percentage of U.S. House Incumbents from Arkansas
Serving More Than Three Consecutive Terms**



Source: Official Records of the Arkansas Secretary of State's Office and *Biographical Directory of the U.S. Congress, 1774-1989*, U.S. Congress Joint Committee on Printing, 1989.

**Average Years Served by Arkansas' U.S. Senators
Since Statehood †**



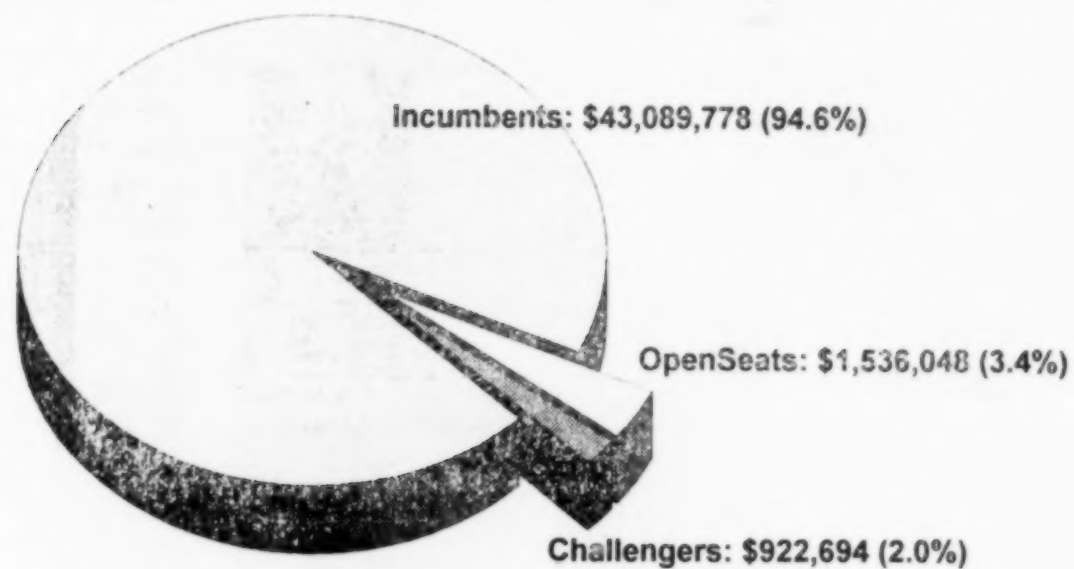
† Includes every Senator seated by Congress including those appointed or elected to fill a vacancy.

* Began direct elections pursuant to Seventeenth Amendment.

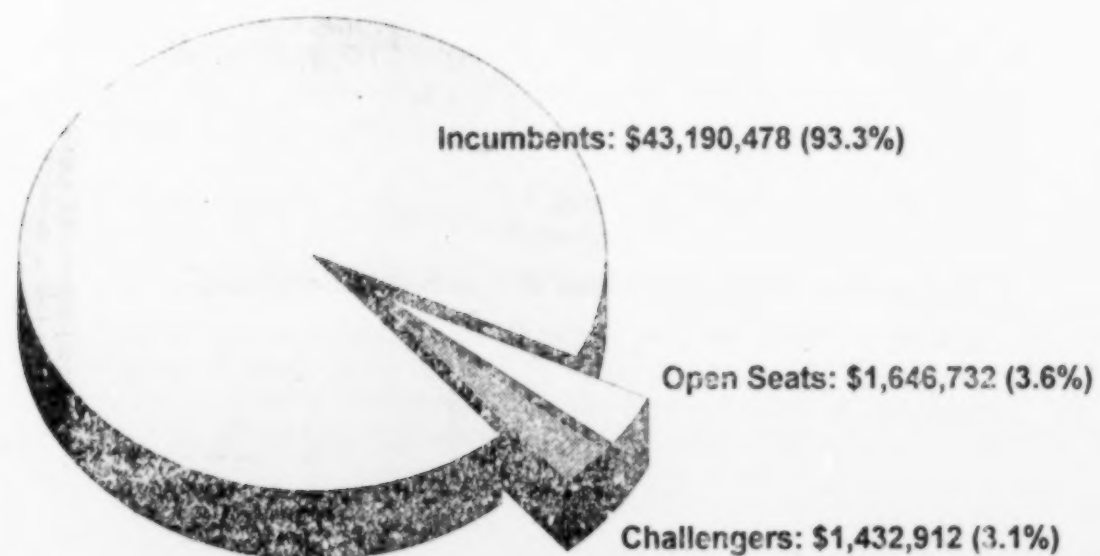
Sources: Official Records of the Office of the Arkansas Secretary of State.

PAC Contributions to U.S. House Candidates

Current Election Cycle



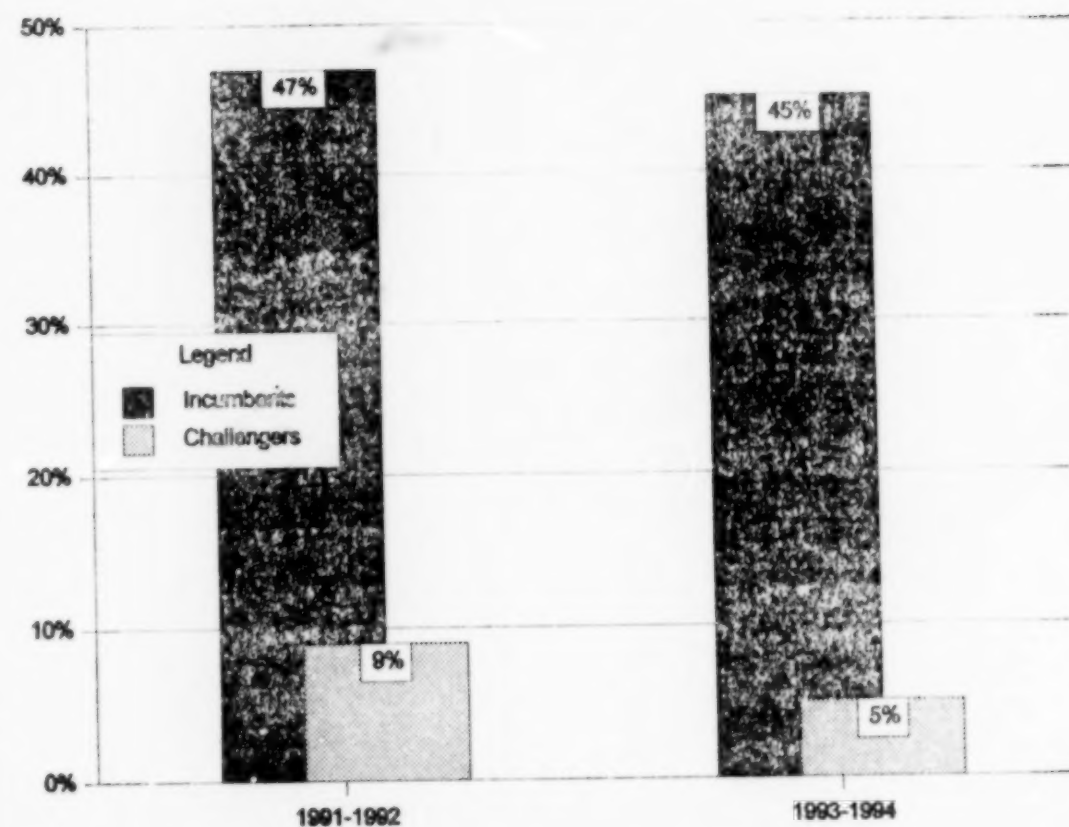
1992 Election Cycle



* For periods January 1, 1993 to March 31, 1994, and January 1, 1991 to March 31, 1992.

Source: *Washington Post*, May 10, 1994, from Federal Election Commission records.

Percentage of U.S. House Candidates' Total Contributions Donated by Pacs

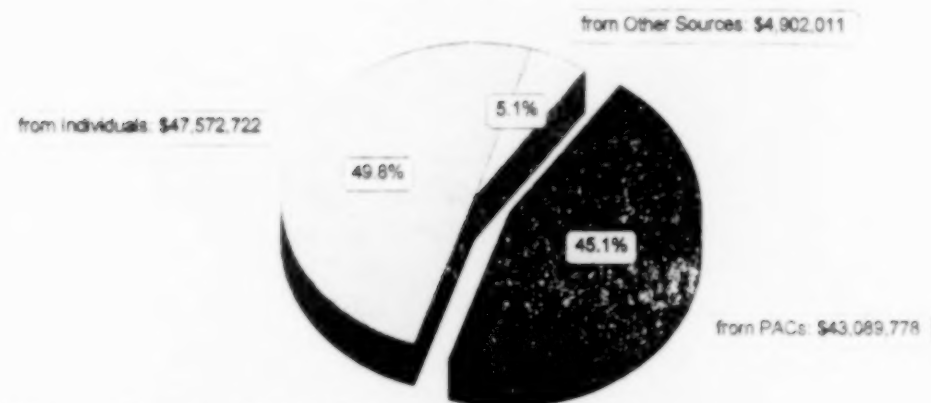


For periods January 1, 1993 to March 31, 1994, and January 1, 1991 to March 31, 1992.

Source: *Washington Post*, May 10, 1994, from Federal Election Commission records.

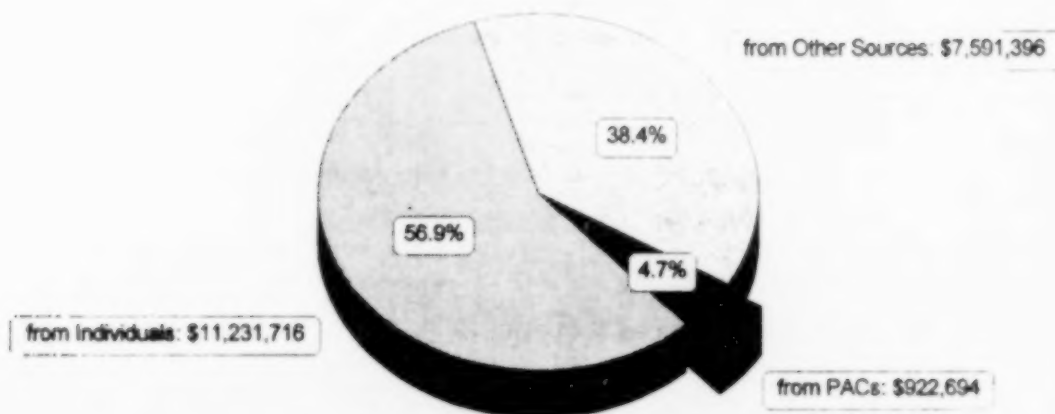
Comparison of Contribution Sources in 1994 U.S. House Campaigns

Incumbents



Total Incumbent Receipts: \$95,564,511

Challengers



Total Challenger Receipts: \$19,745,806

Source: *Washington Post*, May 10, 1994, from Federal Election Commission records.

* January 1, 1993 to March 31, 1994.

AUG 16 1994

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

U.S. TERM LIMITS, INC., ET AL.,

Petitioners,

v.

RAY THORNTON, ET AL.

STATE OF ARKANSAS EX REL. WINSTON BRYANT,
ATTORNEY GENERAL OF THE STATE OF ARKANSAS,

Petitioner,

v.

BOBBIE E. HILL, ET AL.

**On Writ Of Certiorari
To The Supreme Court Of Arkansas**

**BRIEF FOR RESPONDENTS
REPRESENTATIVE JAY DICKEY AND
REPRESENTATIVE TIM HUTCHINSON
SUPPORTING PETITIONERS**

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QUESTION PRESENTED

Whether a State may decline to print on its election ballots the names of multi-term incumbents in the House of Representatives and Senate who are candidates for reelection.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
SUMMARY OF ARGUMENT	2
ARGUMENT	7
I. AMENDMENT 73 DOES NOT IMPLICATE THE QUALIFICATIONS CLAUSES BECAUSE IT DOES NOT IMPOSE AN ADDITIONAL QUALIFICATION FOR MEMBERSHIP IN THE UNITED STATES SENATE OR HOUSE OF REPRESENTATIVES	8
A. Amendment 73 Does Not Impose A Legal Prerequisite To Eligibility for Membership In Congress	9
B. The Term "Qualifications" Encompasses Only Those Attributes Without Which An Individual Is Ineligible As A Matter Of Law For Membership In Congress	11
1. The Text Of The Constitution Makes Clear That The Term "Qualifications" Encompasses Only Those Attributes Without Which An Individual Is Ineligible As A Matter Of Law For Membership In Congress	12
2. The Drafting History And Contemporary Understanding Of The Qualifications Clauses Confirm That The Term "Qualifications" Encompasses Only Those Attributes Without Which An Individual Is Ineligible As A Matter Of Law For Membership In Congress	14
3. Consistent Judicial Interpretation Of The Qualifications Clauses Further	

Table of Contents (continued)

	Page(s)
Demonstrates That The Term "Qualifica- tions" Encompasses Only Those Attributes Without Which An Individual Is Ineligible As A Matter Of Law For Membership In Congress	18
C. The Analysis Of The Court Below Must Be Rejected, Because It Offers No Judicially Manageable Standards For Determining The Validity Of Election Laws And Improperly Intrudes On The Authority Of Congress	21
II. AMENDMENT 73 DOES NOT VIOLATE THE FIRST OR FOURTEENTH AMEND- MENT RIGHTS OF ARKANSAS VOTERS OR CONGRESSIONAL CANDIDATES, BECAUSE IT IMPOSES A REASONABLE AND POLITICALLY NEUTRAL BALLOT ACCESS RESTRICTION DESIGNED TO ENHANCE THE FAIRNESS AND OPEN- NESS OF THE POLITICAL PROCESS	24
A. Amendment 73 Should Be Subjected To Minimal Scrutiny, Because It Imposes Only Minor, Nondiscriminatory Burdens On First And Fourteenth Amendment Rights	26
1. Amendment 73 Is Politically Neutral And Nondiscriminatory	26
2. Amendment 73 Imposes Only Minor Burdens On The Rights Of Candidates And Voters	30
B. The Important State Interests Served By Amendment 73 Are Plainly Sufficient To Justify Its Minimal Burden On Protected Rights	33
CONCLUSION	37

TABLE OF AUTHORITIES

Cases:	Page(s)
<i>American Party of Tex. v. White</i> , 415 U.S. 767 (1974)	28,30
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	<i>passim</i>
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<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973)	22
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<i>International Longshoresmen's Ass'n v. Davis</i> , 476 U.S. 380 (1986)	10
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<i>Joyner v. Mofford</i> , 706 F.2d 1523 (9th Cir.), <i>cert. denied</i> , 464 U.S. 1002 (1983)	19-20

Table of Authorities (Continued)

	Page(s)
<i>Legislature v. Eu</i> , 54 Cal. 3d 492, 286 Cal. Rptr. 283, 816 P.2d 1309 (1991), <i>cert. denied</i> , 112 S. Ct. 1292 (1992)	37
<i>Lubin v. Panish</i> , 415 U.S. 709 (1974)	27,31,32
<i>Maddox v. Fortson</i> , 172 S.E.2d 595 (Ga.), <i>cert. denied</i> , 397 U.S. 149 (1970)	37
<i>Mandel v. Bradley</i> , 432 U.S. 173 (1977)	30
<i>Meek v. Pittenger</i> , 421 U.S. 349 (1975)	37
<i>Munro v. Socialist Workers Party</i> , 479 U.S. 189 (1986)	12
<i>Nixon v. United States</i> , 113 S. Ct. 732 (1993)	12,18
<i>Norman v. Reed</i> , 112 S. Ct. 698 (1992)	27
<i>Oregon v. Mitchell</i> , 400 U.S. 112 (1970)	34
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<i>State ex rel. Maloney v. McCartney</i> , 223 S.E.2d 607 (W. Va.), <i>appeal dismissed for want of subst'l fed'l question</i> , 425 U.S. 946 (1976)	36
<i>State ex rel. O'Sullivan v. Swanson</i> , 257 N.W. 255 (Neb. 1934)	20
<i>State ex rel. Sundfor v. Thorson</i> , 6 N.W.2d 89 (N.D. 1942)	20
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	<i>passim</i>

Table of Authorities (Continued)

	Page(s)
<i>United States Civil Service Commission v. National Association of Letter Carriers</i> , 413 U.S. 548 (1973).....	22
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968)	5,25,27,34
<i>Williams v. Tucker</i> , 382 F. Supp. 381 (M.D. Pa. 1974).....	20

Constitution, Statutes and Rules

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U.S. Const., art. I, § 3, cl. 3.....	8,13
U.S. Const., art. I, § 4, cl. 1.....	7,16,24
U.S. Const., art. I, § 5, cl. 1.....	3,9,13
U.S. Const., amend. IX	7
U.S. Const., amend. X.....	7
Ark. Const., amend. 7	7
Ark. Const., amend. 73, § 3	7
Ark. Const., amend. 73, § 3(a)	9
Ark. Const., amend. 73, § 3(b)	9
Sup. Ct. R. 12.1	1
Sup. Ct. R. 24.1(b)	2
Sup. Ct. R. 24.1(d)	2
Sup. Ct. R. 24.1(e)	2
Sup. Ct. R. 24.1(f)	2
Sup. Ct. R. 24.1(g)	2
Sup. Ct. R. 24.2	1

Table of Authorities (Continued)

	Page(s)
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<i>The Federalist</i> No. 52 (J. Madison) (J. Cooke ed. 1961)	15
<i>The Federalist</i> No. 53 (J. Madison) (J. Cooke ed. 1961)	34
<i>The Federalist</i> No. 60 (A. Hamilton) (J. Cooke ed. 1961)	3,15,16
<i>The Federalist</i> No. 61 (A. Hamilton) (J. Cooke ed. 1961)	18,34
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Table of Authorities (Continued)

	Page(s)
J. Levy, <i>Can They Throw the Bums Out? The Constitutionality of State-Imposed Congressional Term Limits</i> , 80 Geo. L.J. 1913 (1992)	22,28,34,35
Note, <i>The Constitutionality of State-Enacted Term Limits Under the Qualifications Clauses</i> , 71 Tex. L. Rev. 865 (1993)	34

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1456

U.S. TERM LIMITS, INC., ET AL.,

Petitioners,

v.

RAY THORNTON, ET AL.

No. 93-1828
STATE OF ARKANSAS EX REL. WINSTON BRYANT,
ATTORNEY GENERAL OF THE STATE OF ARKANSAS,*Petitioner,*

v.

BOBBIE E. HILL, ET AL.

**On Writ Of Certiorari
To The Supreme Court Of Arkansas**

**BRIEF FOR RESPONDENTS
REPRESENTATIVE JAY DICKEY AND
REPRESENTATIVE TIM HUTCHINSON
SUPPORTING PETITIONERS**

Pursuant to Rules 12.4 and 24.2 of the Rules of this Court, respondents Jay Dickey, United States Representative for the 4th Arkansas Congressional District, and Tim Hutchinson, United States Representative for the 3rd Arkansas Congressional District, respectfully submit this brief in support of petitioners. Respondents adopt by reference those portions of the brief of the State of Arkansas, peti-

tioner in No. 93-1828, that contain the matters required by this Court's Rule 24.1(b), (d), (e), (f), and (g).

SUMMARY OF ARGUMENT

I. The Supreme Court of Arkansas erred in invalidating Amendment 73 as inconsistent with the Qualifications Clauses and *Powell v. McCormack*, 395 U.S. 486 (1969). *Powell* held only that a single House of Congress lacks authority to impose additional qualifications pursuant to its power to judge the qualifications of its members. The *Powell* Court did not decide the separate question whether the people of a State may impose additional qualifications for congressional office in the exercise of their retained powers. That question is not presented in this case either, because Amendment 73 does not impose any additional qualifications for membership in Congress.

A. As construed by the Supreme Court of Arkansas, Amendment 73 merely prevents multi-term congressional incumbents from having their names printed on the election ballots for their congressional offices. Those individuals can still run for reelection as write-in candidates and, if elected by the voters, can still take office in Congress. As a result, it is clear that Amendment 73 does not impose an additional qualification for congressional office.

B. "Qualifications" for office are those attributes that are legal prerequisites to eligibility for office. Mere ballot-access restrictions like Amendment 73, therefore, are not qualifications. This Court so held in *Storer v. Brown*, 415 U.S. 724 (1974), which expressly rejected the claim that a state law barring a certain category of candidates from the ballot constituted an additional qualification for congressional office. The *Storer* Court reasoned that the challenged law did not impose an additional qualification because even candidates subject to its provisions would not be disqualified from membership in Congress if they were elected by the voters. The same is true of Amendment 73, and thus it cannot be found to impose an additional qualification.

Even if *Storer* did not resolve the matter, the judgment below could not withstand scrutiny. The text of the Constitution itself demonstrates that mere ballot-access provisions like Amendment 73 do not create qualifications for office. The Qualifications Clauses speak exclusively in terms of legal disabilities to membership, and do not include provisions that merely make it more difficult for some candidates to win elections. Moreover, the Constitution grants to each House of Congress the power to "Judge . . . the . . . Qualifications of its own Members," U.S. Const., art. I, § 5, cl. 1, but Amendment 73 creates no "[q]ualifications" for the House or Senate to "[j]udge," because it does not purport to bar any candidate who wins election from taking office.

This textual evidence of the meaning of "[q]ualifications" is also supported by the writings of the Framers of the Constitution and their contemporaries. Dictionaries of the era defined "qualification" as "[t]hat which makes any person or thing fit for any thing," 2 S. Johnson, *A Dictionary of the English Language* 1567 (4th ed. 1773), a definition that necessarily excludes Amendment 73, which does not render anyone "[un]fit" for office.

Similarly, James Madison and Alexander Hamilton characterized qualifications for office as those laws specifying the persons "capable of being elected" or "who may . . . be chosen." 2 *The Records of the Federal Convention of 1787* 250 (M. Farrand ed. 1911); *The Federalist* No. 60, at 408-09 (A. Hamilton) (J. Cooke ed. 1961). Amendment 73, of course, does not render anyone legally incapable of "being elected" or "chosen."

Moreover, it is clear that the Founders did not understand "[q]ualifications" to include laws that merely make it more difficult (or even impossible) as a practical matter for certain individuals to win elections. To the contrary, Madison argued for congressional power to override state laws regulating congressional elections precisely *because* he knew that, absent such power in Congress, state legislatures would

possess unrestrained authority to pass laws aiding their preferred candidates at the expense of others. Likewise, in responding to the argument that Congress would have authority to pass laws effectively dictating which candidates would win congressional elections, Hamilton did not suggest that such laws would constitute additional qualifications for office, even though they would as a practical matter exclude some candidates from Congress. Instead, he made that suggestion only with respect to property qualifications, provisions that would impose legal prerequisites to eligibility for membership in Congress.

In addition, this Court has consistently used the term "[q]ualifications" to mean mandatory prerequisites to eligibility for membership. The lower state and federal courts have followed the same approach. Thus, the text, history, and judicial construction of the Qualifications Clauses make clear that mere ballot-access regulations like Amendment 73 do not impose additional qualifications for congressional office.

C. The contrary interpretation adopted by the Supreme Court of Arkansas should be rejected, because it provides no judicially manageable standards for determining the validity of election laws and improperly intrudes on the authority of Congress. The majority opinions below would apparently invalidate any election laws that leave only "glimmers of opportunity" for particular candidates or place some candidates "at a distinct disadvantage," but courts are ill-equipped to judge the validity of laws based on such a vague and content-less standard.

Indeed, a straightforward application of that standard would necessarily result in the invalidation of numerous state and federal ballot-access provisions, resign-to-run laws, and regulations of the political activities of government employees and others, because all of those laws place more or less severe burdens on the ability of particular classes of individuals to obtain congressional office. Moreover, that stan-

dard would require invalidation of the numerous laws that provide political benefits for multi-term congressional incumbents, because those laws create overwhelming political advantages for multi-term incumbents and corresponding disadvantages for challengers.

Courts ought not inject themselves so deeply into the regulation of congressional elections. Legislative control over the electoral process is necessary to avoid chaos. Moreover, the Constitution gives to Congress, not the courts, the ultimate authority to override unwise state election laws. Accordingly, this Court should reject the analysis of the court below and hold that Amendment 73 does not impose an additional qualification for congressional office.

II. Amendment 73 does not violate the First or Fourteenth Amendments. In reviewing the constitutionality of laws that tend to limit the field of candidates from which voters might choose, this Court applies a flexible standard that weighs the character and magnitude of the burdens imposed by the challenged law against the interests supporting the law and the extent to which the law furthers those interests. Laws like Amendment 73 that impose only reasonable, nondiscriminatory burdens on First and Fourteenth Amendment rights will generally be upheld.

A. In determining whether a challenged election law should be subjected to strict judicial scrutiny, the Court has focused primarily on the extent to which the law discriminates against politically disadvantaged groups such as minor parties, independent candidates, or the indigent. Where a challenged law does unfairly burden such groups, the Court has consistently invalidated it. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Williams v. Rhodes*, 393 U.S. 23 (1968). On the other hand, the Court has repeatedly upheld regulations of the election process that do not discriminate against politically disadvantaged groups or otherwise attempt to maintain the status quo. *See, e.g., Storer v. Brown*, 415 U.S. 724 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971).

Amendment 73 does not discriminate against any politically disadvantaged groups or serve to maintain the status quo. Instead, it burdens only the political opportunity of multi-term incumbents, a uniquely privileged class. As this Court's decision in *Clements v. Fashing*, 457 U.S. 957 (1982), makes clear, laws like Amendment 73 that restrict the candidacy rights of incumbents without regard to political affiliation or viewpoint are neutral and nondiscriminatory.

Amendment 73 imposes only minor burdens on the rights of candidates and voters. In particular, its impact on candidates will fall on only a handful of individuals, and even as to them will entail only narrow restrictions on political opportunity. Moreover, there is no fundamental right of candidacy, so the Amendment's burden on candidates could not justify imposition of strict scrutiny under any circumstances.

The Amendment's impact on the rights of voters is even less significant, because it does not limit in any way the ability of voters to vote for whomever they choose or to associate together to place on the ballot a candidate reflecting their particular political views. While the Amendment does prevent voters from seeing the names of certain multi-term incumbents on the ballot, that limitation applies only to a tiny fraction of the potential candidates, and in any event there is no fundamental right to have any particular individual listed on the ballot. As this Court made clear in *Anderson v. Celebrezze*, the crucial consideration is whether a challenged election law precludes particular groups from placing *any* candidate on the ballot; Amendment 73 does not, and accordingly it should be subjected only to minimal scrutiny.

B. Amendment 73 directly serves the important, and indeed compelling, state interests in ensuring the fairness and integrity of elections and preserving openness and competition in the political marketplace. The present system of congressional elections is far less free and less competitive than it was intended to be, in large part because of the significant

advantages provided to multi-term congressional incumbents by virtue of their positions. Those advantages of congressional office bolster the electoral strength of multi-term incumbents in ways wholly unrelated to the appeal of their political views, and thus state action aimed at reducing those advantages fosters the core values of the First and Fourteenth Amendments by promoting competition, integrity, and openness.

Amendment 73 is a necessary response to the present imbalance in the electoral system. In a measured and reasonable way, it places a minor burden on the political opportunity of multi-term incumbents in order to counteract the government-provided benefits of long-term incumbency and thereby render congressional elections more fair and open and encourage political debate and involvement. The First and Fourteenth Amendments do not preclude the State of Arkansas from achieving those salutary results in this manner.

ARGUMENT

THE STATES ARE FREE TO EXCLUDE THE NAMES OF MULTI-TERM UNITED STATES SENATORS AND REPRESENTATIVES FROM ELECTION BALLOTS FOR THOSE OFFICES

Exercising the powers retained by them under the Arkansas Constitution (Ark. Const., amend. 7) and the Constitution of the United States (U.S. Const., art. I, § 4, cl. 1; *id.*, amend. IX and X), the people of the State of Arkansas have chosen to exclude the names of multi-term congressional incumbents from ballots for election to the offices previously held by those individuals. Ark. Const., amend. 73, § 3 (*reproduced at* Appendix to the Petition for a Writ of Certiorari in No. 93-1456 ("Pet. App."), at 69a). Nothing about that choice contravenes the requirements of the federal Constitution.

I. AMENDMENT 73 DOES NOT IMPLICATE THE QUALIFICATIONS CLAUSES BECAUSE IT DOES NOT IMPOSE AN ADDITIONAL QUALIFICATION FOR MEMBERSHIP IN THE UNITED STATES SENATE OR HOUSE OF REPRESENTATIVES

Relying on *Powell v. McCormack*, 395 U.S. 486 (1969), the Supreme Court of Arkansas struck down Amendment 73's congressional ballot-access restriction on the ground that it violates the Qualifications Clauses, U.S. Const., art. I, § 2, cl. 2, and art. I, § 3, cl. 3.¹ Pet. App. 11a-15a. According to the Arkansas court, the three qualifications for congressional office set forth in the Qualifications Clauses—age, years of citizenship, and residence within the State—were intended to be exclusive, and Amendment 73 impermissibly imposes “[a]n additional qualification,” namely, lack of “prior service.” Pet. App. 15a. The Supreme Court of Arkansas plainly erred in reaching that conclusion.

Powell v. McCormack involved a challenge to the authority of the House of Representatives to exclude by majority vote a Representative who had been elected by the voters of his district and who met all of the qualifications for office set forth in the Constitution. Examining the text and history of the Constitution, the Court concluded that the constitutional authority of each House of Congress to

¹ The Qualifications Clause for the House of Representatives, U.S. Const., art. I, § 2, cl. 2, provides:

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Similarly, the Qualifications Clause for the Senate, U.S. Const., art. I, § 3, cl. 3, provides:

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

“be the Judge of the . . . Qualifications of its own Members,” U.S. Const. art. I, § 5, cl. 1, is “limited to the standing qualifications prescribed in the Constitution.” 395 U.S. at 550. As a consequence, the Court held that “the House [of Representatives] is without power to exclude any member-elect who meets the Constitution’s requirements for membership.” *Id.* at 547.

The question presented in *Powell* concerned the power of a single House of Congress to impose additional qualifications in the exercise of its authority under art. I, § 5, cl. 1. Accordingly, the *Powell* Court limited its holding to that issue, and did not purport to decide the separate question whether a State (or its citizens) may impose additional qualifications for congressional membership under either art. I, § 4, cl. 1 of the Constitution or the powers retained by virtue of the Ninth and Tenth Amendments. *Cf. Buckley v. Valeo*, 424 U.S. 1, 133 (1976) (per curiam) (leaving open the question of Congress’s power to impose additional membership qualifications). This case likewise presents no opportunity for this Court to resolve that question, because the language of Amendment 73 and the text, history, and consistent judicial interpretation of the Qualifications Clauses make clear that Amendment 73 does not impose an additional qualification for congressional membership.

A. Amendment 73 Does Not Impose A Legal Prerequisite To Eligibility for Membership In Congress

As definitively construed by the Supreme Court of Arkansas, Amendment 73 does not in any way narrow the class of persons legally eligible for membership in the United States Senate or House of Representatives. The Amendment merely limits access to the State’s printed ballots for those offices: “[a]ny person” meeting the multi-term incumbency requirements “shall not be eligible to have his/her name placed on the ballot for election” to the relevant congressional office. Ark. Const., amend. 73, § 3(a) and (b); Pet. App. 69a.

Under Arkansas law, the fact that an individual's name cannot be printed on the ballot does not disqualify that individual from membership in Congress. To the contrary, the Supreme Court of Arkansas expressly "recognize[d] that an ineligible congressman under Amendment 73 is not totally disqualified and might run as a write-in candidate for Congress or receive a gubernatorial appointment to fill a vacancy in the same body." Pet. App. 15a; *see id.* at 27a (Dudley, J., concurring in part and dissenting in part); *id.* at 37a (Cracraft, Spec. C.J., concurring in part; dissenting in part). That interpretation of Amendment 73 is binding on this Court (*see, e.g., International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387 (1986)), and it conclusively demonstrates that the Amendment does not impose an additional "qualification" for congressional office because it does not limit in any way the class of persons eligible for membership in Congress.

To be sure, the exclusion of long-term incumbents from election ballots will undoubtedly make it more difficult for those individuals to win reelection, and may well result in electoral defeat for many incumbents who seek reelection as write-in candidates. For that reason, the Supreme Court of Arkansas concluded that Amendment 73 imposes an additional qualification for congressional office. *See* Pet. App. 15a (reasoning that Amendment 73 imposes an additional qualification because it provides only "glimmers of opportunity for those disqualified" from access to the ballot); *id.* at 27a (Dudley, J., concurring in part and dissenting in part) (Amendment 73 imposes a qualification because "write-in candidates are at a distinct disadvantage").

That conclusion must be rejected because it rests on a fundamental misunderstanding of the nature of a qualification for congressional office. As demonstrated below, laws that merely restrict access to the ballot without rendering anyone ineligible for office simply do not constitute "[q]ualifications" within the meaning of the Constitution.

B. The Term "Qualifications" Encompasses Only Those Attributes Without Which An Individual Is Ineligible As A Matter Of Law For Membership In Congress

Properly understood, "[q]ualifications" are those attributes that are necessary to render an individual legally eligible to become a Member of Congress and without which the individual is, as a matter of law, absolutely disqualified from membership. A mere restriction on access to the ballot, therefore, cannot constitute a qualification for congressional office, because it does not render any person ineligible for office as a matter of law.

This Court held precisely that in *Storer v. Brown*, 415 U.S. 724 (1974). In that case, independent congressional candidates challenged the constitutionality of a California statute that barred them from access to the ballot because they had been affiliated with a political party within one year prior to the immediately preceding primary. *Id.* at 726-27. The candidates argued, *inter alia*, that California's refusal to include their names on the ballot added an additional qualification for congressional office in violation of the Qualifications Clause applicable to the House of Representatives, U.S. Const., art. I, § 2, cl. 2. *See* 415 U.S. at 727.

This Court squarely rejected the candidates' argument, explaining:

The argument is wholly without merit. [*Appellants*] would not have been disqualified had they been nominated at a party primary or by an adequately supported independent petition and then elected at the general election. The [challenged] requirement no more establishes an additional requirement for the office of Representative than the requirement that the candidate win the primary to secure a place on the general ballot or otherwise demonstrate substantial community support.

415 U.S. at 746 n.16 (emphasis added).

Storer compels rejection of the conclusion below that Amendment 73 amounts to an additional qualification for office merely because it excludes certain candidates from the ballot. Just as in *Storer*, any Arkansas congressional candidate who is subject to the ballot-access restrictions contained in Amendment 73 "would not . . . be disqualified" from membership in the House or Senate if he or she chooses to run and is "then elected at the general election." 415 U.S. at 746 n.16. Thus, Amendment 73 "no more establishes an additional requirement for the office of Representative" or Senator than does any other ballot-access restriction. *Id.* Under *Storer*, a mere restriction on access to the ballot—even one that "serve[s] as an absolute bar to ballot access," *Munro v. Socialist Workers Party*, 479 U.S. 189, 198 (1986)—is not an additional qualification for congressional membership if it does not preclude a candidate who wins the general election from taking his or her seat in Congress.

In any event, even if *Storer* did not dispose of the Qualifications Clauses issue in this case, the decision below could not withstand scrutiny, because it is directly inconsistent with the text, history, and longstanding judicial construction of the Qualifications Clauses and related provisions. As those authorities conclusively demonstrate, laws like Amendment 73 that do not disqualify anyone from eligibility for membership in Congress but instead merely make it more difficult for a particular class of individuals to win elections do not impose "[q]ualifications" within the meaning of the Constitution. Accordingly, Amendment 73 does not violate the Qualifications Clauses.

1. The Text Of The Constitution Makes Clear That The Term "Qualifications" Encompasses Only Those Attributes Without Which An Individual Is Ineligible As A Matter Of Law For Membership In Congress

In ascertaining the meaning of the Constitution, "the plain language of the enacted text is the best indicator of intent." *Nixon v. United States*, 113 S. Ct. 732, 737 (1993).

In this case, the text of the relevant provisions reveals that a law barring individuals from access to the ballot but leaving them free to serve as Members of Congress does not constitute a qualification for congressional office within the meaning of the Constitution.

The Qualifications Clauses themselves speak exclusively in terms of legal disabilities to membership, and do not extend to mere burdens on the ability of some candidates to win election: "*No Person shall be a [Representative or Senator] who shall not have attained to the [requisite] Age . . . , and been . . . a Citizen of the United States [for the requisite time period], and who shall not, when elected, be an Inhabitant of that State [in] which he shall be chosen.*" U.S. Const., art. I, § 2, cl. 2, and § 3, cl. 3 (emphasis added). Amendment 73, by contrast, does not provide that "[n]o person shall be a" Representative or Senator after having served the requisite number of terms in office; instead, it excludes such persons from the ballot but leaves them otherwise free to serve as Members of the House or Senate for as long as the voters choose to reelect them. The clear implication is that Amendment 73 does not impose an additional qualification for membership in Congress.

A related provision of the Constitution confirms the commonsense notion that a ballot-access restriction like Amendment 73 is not a qualification for congressional office. Art. I, § 5, cl. 1 makes each House "the Judge of the Elections, Returns and Qualifications of its own Members." Obviously, then, the term "[q]ualifications" must refer to those attributes that are capable of being judged by the House or Senate in determining whether to seat a prospective Member. Amendment 73 leaves nothing for the House or Senate to "[j]udge," however, because it does not disable any individual who wins election from taking office. Accordingly, the text of the Constitution compels rejection of the claim that Amendment 73 imposes an additional qualification for congressional membership.

2. The Drafting History And Contemporary Understanding Of The Qualifications Clauses Confirm That The Term "Qualifications" Encompasses Only Those Attributes Without Which An Individual Is Ineligible As A Matter Of Law For Membership In Congress

The Framers of the Constitution and their contemporaries plainly understood the term "[q]ualifications" as used in the Constitution to refer exclusively to those attributes of candidates that were absolute prerequisites to eligibility for office. The dictionary definition of "qualification" was then, as it is now, "[t]hat which makes any person or thing fit for any thing." 2 S. Johnson, *A Dictionary of the English Language* 1567 (4th ed. 1773); see Webster's *Third New Int'l Dictionary* 1858 (1976) ("qualification" means "an endowment or acquirement that fits a person (as for an office)" or "a condition precedent that must be complied with (as for the attainment of a privilege)").² Under that definition, of course, a law making it merely difficult, but not impermissible as a matter of law, for an individual to be elected to a particular office does not constitute a "qualification" because it does not render anyone "[un]fit" for office.

Not surprisingly, the available historical sources confirm that the Framers consistently used the term "qualifications" in this manner. James Madison, for example, asserted that the "qualifications" of elected officials were expressed in those laws "limiting the number [of persons] *capable of being elected*." 2 *The Records of the Federal Convention of 1787* 250 (M. Farrand ed. 1911) (hereinafter "Farrand") (emphasis added); cf. *id.* at 249-50 ("qualifications of electors" limit "the number [of persons] *authorised to elect*") (emphasis added).

² Accord J. Bouvier, *A Law Dictionary* 408 (6th ed. 1856) (defining "[q]ualification" to mean "[h]aving the requisite qualities for a thing; as, to be president of the United States, the candidate must possess certain qualifications."); see also 2 S. Johnson, *supra*, at 1567 (defining "to qualify" as "[t]o fit for any thing" or "[t]o make capable of any employment or privilege: as, he is *qualified* to kill game").

Madison specifically characterized the Qualifications Clauses as setting forth "[t]he qualifications *of the elected*." *The Federalist* No. 52, at 354-55 (J. Madison) (J. Cooke ed. 1961) (emphasis added). Similarly, Alexander Hamilton took the position that the Qualifications Clauses define "[t]he qualifications *of the persons who may . . . be chosen*" for Congress. *The Federalist* No. 60, at 408-09 (A. Hamilton) (J. Cooke ed. 1961) (emphasis added). Amendment 73's exclusion of multi-term incumbents from the ballot is plainly not a "qualification[]" in the sense understood by Madison and Hamilton, because it does not remove those incumbents from the category of "persons who may . . . be chosen" or "elected."

This understanding of the meaning of the term "qualifications" was universal among legal thinkers of the era. William Blackstone, for example, who was the leading legal scholar known in this country at the time of the Constitutional Convention, used the word in precisely the same sense; his listing of the "qualifications" of members of the House of Commons consists of various attributes that members "must" or "must not" have and that render them "eligible" or "not eligible" to be members or "capable of being elected." 1 W. Blackstone, *Commentaries on the Laws of England* 169-70 (1st ed. 1765). Not one of the "qualifications" listed by Blackstone is a provision that merely makes it more difficult for a class of individuals to win elections; rather, each of those qualifications is an absolute legal prerequisite to an individual's eligibility to serve as a member of Parliament, and applies *regardless* of the outcome of the election.

To the same effect is Justice Story's treatise on the Constitution, which uses the term "qualifications" interchangeably with "prerequisites to office." 2 J. Story, *Commentaries on the Constitution of the United States* § 612, at 89 (1st ed. 1833). Indeed, in arguing that the Qualifications Clauses preclude imposition of additional qualifications for congressional office, Story makes clear his understanding that the Clauses would not be implicated by anything short of a legal

prerequisite to eligibility for membership in Congress: "when the constitution established certain qualifications, *as necessary for office*, it meant to exclude all others, *as prerequisites*." *Id.* § 624, at 100 (emphasis added). See also 2 *The Founders Constitution* 75 (P. Kurland & R. Lerner eds. 1987) (quoting Wilson Nicholas, a delegate to the Virginia ratifying convention, who characterized "the qualifications of the elected" as determining who "should be excluded from the right of being chosen to the legislature"). There is simply no historical support for the notion that a law imposes an additional qualification for office if it merely renders electoral success more difficult for some persons without categorically barring them from taking office if chosen by the electorate. Indeed, both Madison and Hamilton expressed the opposite belief. At the Constitutional Convention, for example, Madison argued strenuously in favor of congressional authority to override state laws enacted under the Times, Places and Manner Clause, which authorizes the States to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const., art. I, § 4, cl. 1. Madison took this position precisely *because* he understood that, if Congress did not have that power, the States' undoubted authority to enact election laws favoring one class of candidates over another would be wholly unrestrained: "[M]any . . . points [of election procedure] would depend on the [State] Legislatures[,] and might *materially affect the appointments* [to the House of Representatives]. Whenever the State Legislatures had a favorite measure to carry, *they would take care so to mould their regulations as to favor the candidates they wished to succeed*." 2 Farrand 240-41 (emphases added). Madison's view prevailed, and Congress now possesses plenary authority under the Times, Places and Manner Clause.

If Madison had believed that state election laws favoring one class of candidates over another would constitute invalid attempts to impose additional qualifications for of-

fice, there would have been no reason for him to express concerns about such laws or to argue in favor of granting Congress the power to override them. Madison did express those concerns, however, because he understood that the Qualifications Clauses did not preclude the States from enacting election laws that would make it more difficult for certain candidates to win congressional elections.

Hamilton's views on this issue were the same. In *The Federalist* No. 60, he addressed the contention that the powers granted to Congress (and, therefore, to the States as well) by the Times, Places and Manner Clause "might be employed in such a manner as *to promote the election of some favourite class of men in exclusion of others*; by confining the places of election to particular districts, and rendering it impracticable to the citizens at large to partake in the choice." *The Federalist* No. 60, at 403-04 (A. Hamilton) (J. Cooke ed. 1961) (emphasis added). Rather than suggest that a law effectively precluding the election of certain candidates would amount to an unconstitutional additional qualification for congressional office, Hamilton offered an entirely different response: he argued that such an assault on the people's liberties would be unlikely to succeed (*id.* at 404-08), and that even if the expedient suggested might be successful it would likely take a different form. *Id.* at 409-10.

Hamilton's failure to rely on the Qualifications Clauses in response to fears of congressional control over election outcomes cannot be dismissed as an oversight. In the very same discussion, he argued that Congress could not achieve an equivalent result "by prescribing qualifications of property . . . for those who may . . . be elected," because "[t]he qualifications of the persons who may . . . be chosen . . . are unalterable by the [Congress]." *Id.* at 408, 409. The only possible explanation for Hamilton's position is that he understood the term "[q]ualifications" as used in the Constitution to refer only to prerequisites to eligibility for office, and not to

laws that make it more difficult (or even impossible) as a practical matter for some individuals to win elections.³

As the foregoing authorities demonstrate, the Founders and their contemporaries understood the term "[q]ualifications" to refer exclusively to those attributes that constitute legal prerequisites to service in Congress. Wholly excluded from the category of "[q]ualifications" were those laws that merely made it more difficult for some candidates to win elections without rendering anyone ineligible as a matter of law to hold office. Given this uniform understanding of the constitutional text, there is no basis for concluding that Amendment 73 imposes an additional qualification for congressional membership.

3. Consistent Judicial Interpretation Of The Qualifications Clauses Further Demonstrates That The Term "Qualifications" Encompasses Only Those Attributes Without Which An Individual Is Ineligible As A Matter Of Law For Membership In Congress

In keeping with the text and historical understanding of the Qualifications Clauses, this Court has consistently used the term "[q]ualifications" to mean legal prerequisites to eligibility for membership in Congress. Thus, in *Powell v. McCormack*, the Court characterized qualifications as "requirements for membership" (395 U.S. at 522, 533, 547) that "limit[] whom the people can select." *Id.* at 547. See also *Nixon v. United States*, 113 S. Ct. at 740 (discussing

³ Indeed, Hamilton believed that one *virtue* of the Times, Places and Manner Clause was that it authorized legislation to prevent any one political faction from maintaining permanent control of Congress. In particular, he argued that Congress's power under the Times, Places and Manner Clause to prescribe a uniform date for congressional elections would provide "a security against the perpetuation of the same spirit in [Congress]." *The Federalist* No. 61, at 413 (A. Hamilton) (J. Cooke ed. 1961). Amendment 73 is aimed at precisely the same result, so it is apparent that Hamilton would have seen no constitutional impediment to its enforcement.

which qualifications "might be imposed for House membership"); *Buckley v. Valeo*, 424 U.S. at 133 (discussing the question of Congress's power to impose "substantive qualifications on the right to . . . hold . . . office [as Senator or Representative]").

In *Storer v. Brown*, moreover, the Court referred to qualifications as "requirement[s] for . . . office," and squarely held that laws excluding particular individuals from access to the ballot but leaving them otherwise free to take office if elected do not constitute additional qualifications within the meaning of the Constitution. 415 U.S. at 746 n.16. *Storer* is directly inconsistent with the notion that laws merely making it more difficult to win elections constitute additional qualifications for office.

The lower federal and state courts have similarly concluded that the Qualifications Clauses are not implicated by state laws that do not render candidates legally ineligible for membership in Congress. In *Hopfmann v. Connolly*, 746 F.2d 97 (1st Cir. 1984), *vacated in other part on other grounds*, 471 U.S. 459 (1985), for example, the First Circuit rejected the claim that a provision barring certain candidates from access to the general election ballot for United States Senator constituted an additional qualification for office. The court explained: "the test to determine whether or not the 'restriction' amounts to a 'qualification' within the meaning of Article I, Section 3, is whether the candidate 'could be elected if his name were written in by a sufficient number of electors.'" 746 F.2d at 103 (quoting *State ex rel. Johnson v. Crane*, 197 P.2d 864, 871 (Wyo. 1948)). Under that test, of course, Amendment 73 does not impose a qualification for membership in Congress, because it does not preclude any incumbent from being elected and taking office if his or her "name [is] written in by a sufficient number of electors."

Numerous other cases are to the same effect. See, e.g., *Joyner v. Mofford*, 706 F.2d 1523, 1531 (9th Cir.) (state

resign-to-run law "does not impose a fourth qualification on candidates for Congress because it does not prevent an elected state officeholder [who resigns or is removed from state office] from running for federal office"), *cert. denied*, 464 U.S. 1002 (1983); *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821, 832 (N.D. Ga.) (quoting *Hopfmann v. Connolly*, *supra*), *aff'd*, 992 F.2d 1548 (11th Cir. 1993); *Williams v. Tucker*, 382 F. Supp. 381, 388 (M.D. Pa. 1974); *State ex rel. O'Sullivan v. Swanson*, 257 N.W. 255, 255-56 (Neb. 1934) (rejecting senatorial candidate's challenge to state statute excluding him from general election ballot, because "[t]he question is not whether he may be a candidate, but whether he may be nominated by petition and have his name printed on the ballot at the state's expense. He may be a candidate and if electors write his name on the ballot in sufficient numbers he will be elected. . . . The state statute in no manner seeks to add other qualifications. It does not prevent him from being a candidate."); *see also Shub v. Simpson*, 76 A.2d 332 (Md.), *appeal dismissed as moot*, 340 U.S. 881 (1950) (discussing *State ex rel. O'Sullivan v. Swanson*, *supra*, with approval); *State ex rel. Johnson v. Crane*, 197 P.2d at 870-71 (same); *State ex rel. Sundfor v. Thorson*, 6 N.W.2d 89, 91-92 (N.D. 1942) (same). These authorities confirm the longstanding judicial understanding that the category of "[q]ualifications" is limited to legal prerequisites for office.

The foregoing authorities demonstrate conclusively that Amendment 73 does not impose an additional qualification for membership in Congress. The Supreme Court of Arkansas's conclusion to the contrary is simply impossible to reconcile with the text, history, and longstanding judicial interpretation of the Qualifications Clauses.

C. The Analysis Of The Court Below Must Be Rejected, Because It Offers No Judicially Manageable Standards For Determining The Validity Of Election Laws And Improperly Intrudes On The Authority Of Congress

The Supreme Court of Arkansas reasoned that Amendment 73 constitutes a qualification for congressional office because it makes election to such office more difficult—but not legally impermissible—for a particular class of individuals. *See* Pet. App. 15a; *id.* at 27a (Dudley, J., concurring in part and dissenting in part); *id.* at 41a (G. Brown, Spec. J., concurring in part; dissenting in part). That reasoning should be rejected by this Court, because it provides no judicially manageable standards for determining whether a regulation of the electoral process is unconstitutional. Moreover, because the Constitution expressly allocates to Congress the ultimate authority to regulate the manner by which congressional elections are to be conducted, it would be inappropriate for the judiciary to usurp that role in the manner suggested by the court below.

The various opinions of the majority of the Arkansas Supreme Court offer no meaningful standard for deciding whether an election law imposes an additional qualification for congressional office. Instead, any law that leaves only "glimmers of opportunity" for a particular class of candidates (Pet. App. 15a) or that places some candidates "at a distinct disadvantage" (*id.* at 27a (Dudley, J., concurring in part and dissenting in part)) would apparently be invalidated under the analysis applied below.

Courts are ill-equipped to judge the validity of legislative enactments based on such a vague and content-less standard. Virtually every ballot-access restriction, for example, excludes some candidates from the ballot and leaves them with, at best, mere "glimmers of opportunity" for electoral success.⁴ Under the approach developed by the court below, all

⁴ Indeed, the candidates who were excluded from the ballot in *Storer v. Brown* were in precisely the same situation as are the multi-term

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such laws must be invalidated, unless the courts are to be given wholly unrestrained discretion to pick and choose those ballot-access provisions that comport with judicial views of wise policy.

More generally, if this Court were to strike down Amendment 73 on the ground that it imposes an impermissible additional qualification for congressional office, there would be no principled basis on which to uphold a wide array of election regulations and related provisions adopted by state legislatures and Congress. State resign-to-run laws (*see, e.g., Clements v. Fashing*, 457 U.S. 957 (1982)), the federal Hatch Act (*see, e.g., United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973)), and countless other provisions of state and federal law (*see, e.g., Branch v. FCC*, 824 F.2d 37 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)) impose direct and substantial burdens on the ability of large classes of individuals to obtain congressional office. Those provisions unquestionably place the affected individuals "at a distinct disadvantage" if they wish to run for Congress and, as a practical matter, may well eliminate even the slightest "glimmers of opportunity" for those individuals.

Similarly, it is well recognized that challengers face almost insurmountable odds in seeking to unseat multi-term congressional incumbents, in large part because of various laws enacted by Congress that provide considerable political benefits to those incumbents. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 31 n.33 (1976); J. Levy, *Can They Throw the Bums Out? The Constitutionality of State-Imposed Congressional Term Limits*, 80 Geo. L.J. 1913, 1916 (1992). Congressional

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incumbents who will be affected by Amendment 73. Any interpretation of the Qualifications Clauses that invalidates Amendment 73 must necessarily have the same effect on the California statute at issue in *Storer* and on all equivalent statutes.

legislation providing these benefits to multi-term incumbents unquestionably places challengers at "a distinct disadvantage," and indeed makes electoral success all but impossible in many cases.

The constitutionality of such legislation has never been open to serious question, but a ruling that Amendment 73 constitutes an impermissible additional qualification would necessarily result in invalidation of those laws as well, because they too place heavy burdens on the ability of some candidates to win elections against multi-term incumbents. If the category of congressional "[q]ualifications" is extended to include laws like Amendment 73 that affect the electoral prospects of specific individuals without denying them eligibility for office, there will be no basis for upholding any such legislation. After all, Amendment 73 merely attempts to level the playing field for candidates challenging multi-term incumbents; if the Constitution can be interpreted to forbid such laws, *a fortiori* it must also forbid the laws that help maintain the present unbalanced electoral system.

The impropriety of injecting the courts so deeply into the regulation of congressional elections is patently obvious. As this Court has recognized, "'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.'" *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (quoting *Storer v. Brown*, 415 U.S. at 730). No such "substantial regulation" of congressional elections will be possible, however, if the Qualifications Clauses are to be interpreted to preclude Congress and the States from adopting ballot-access restrictions, campaign finance laws, and the myriad of other election laws that directly or indirectly affect the ability of particular individuals to win congressional elections.

Moreover, the Constitution expressly identifies Congress, not the courts, as the repository of ultimate federal authority to override unwise or harmful state election laws. The

Times, Places and Manner Clause authorizes the States, in the first instance, to regulate the conduct of congressional elections, but provides that "the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const., art. I, § 4, cl. 1. This textual commitment of authority to Congress counsels strongly against judicial intervention in this area, at least in the absence of equally explicit provisions—such as the First and Fourteenth Amendments, *see infra* part II—that provide judicially identifiable and manageable standards to be applied by the courts in judging the validity of election laws.

The approach followed by the court below provides no such standards, and would necessarily lead to undue judicial intrusion into political and policy matters entrusted by the Constitution to Congress. Accordingly, this Court should reject the analysis of the Supreme Court of Arkansas and hold that Amendment 73 does not violate the Qualifications Clauses.⁵

II. AMENDMENT 73 DOES NOT VIOLATE THE FIRST OR FOURTEENTH AMENDMENT RIGHTS OF ARKANSAS VOTERS OR CONGRESSIONAL CANDIDATES, BECAUSE IT IMPOSES A REASONABLE AND POLITICALLY NEUTRAL BALLOT ACCESS RESTRICTION DESIGNED TO ENHANCE THE FAIRNESS AND OPENNESS OF THE POLITICAL PROCESS

The provision of Amendment 73 at issue in this case bars a small class of individuals from access to the general election ballots for certain offices. It is well established that laws restricting access to the ballot will sometimes "place

⁵ Even if Amendment 73 did impose an additional qualification for membership in Congress, it would not violate the Constitution. As explained in the brief of petitioner the State of Arkansas, the people of the various States retain the power to limit the class of persons from whom they will select their representatives, and Amendment 73 is an appropriate exercise of that power. For the reasons set forth in text, however, it is unnecessary to reach that question in this case.

burdens on two different, although overlapping, kinds of rights [under the First and Fourteenth Amendments]—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *see, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979).

As this Court has repeatedly cautioned, however, "the mere fact that a State's system 'creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.'" *Burdick v. Takushi*, 112 S. Ct. 2059, 2063 (1992) (omissions in original) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)); *see Anderson v. Celebrezze*, 460 U.S. at 788. Rather, because "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest," *id.* (quoting *Storer v. Brown*, 415 U.S. at 730), the validity of such regulations has been judged by "a more flexible standard." *Burdick v. Takushi*, 112 S. Ct. at 2063.

Therefore, a reviewing court must "weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id.* at 2063 (quoting *Anderson v. Celebrezze*, 460 U.S. at 789). The rigorousness of a court's scrutiny of a ballot-access restriction will depend on the nature and extent of the burdens imposed on First and Fourteenth Amendment rights: "when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance,'" but "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amend-

ment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick v. Takushi*, 112 S. Ct. at 2063-64 (quoting *Anderson v. Celebrezze*, 460 U.S. at 788).

The ballot-access restrictions at issue in this case readily pass constitutional muster under the Court's standard.⁶ Amendment 73 does not discriminate against indigent or independent candidates as a class, nor does it impinge on the ability of minor parties to obtain access to the ballot. The Amendment's direct effect falls on candidates, not voters, and it burdens the opportunity to seek elective office in only a limited and politically neutral manner. The Amendment's indirect impact on voters is even more insignificant, because it does not in any way limit their ability to vote for whomever they choose or to associate with like-minded individuals for the advancement of their common political beliefs. Accordingly, Amendment 73 cannot be deemed to violate the rights of Arkansas congressional candidates or voters.

A. Amendment 73 Should Be Subjected To Minimal Scrutiny, Because It Imposes Only Minor, Nondiscriminatory Burdens On First And Fourteenth Amendment Rights

1. Amendment 73 Is Politically Neutral And Non-discriminatory

In determining whether "the character and magnitude of" the burdens imposed by a particular ballot-access restriction are sufficiently severe as to require strict judicial scrutiny, this Court has focused primarily on the extent to which the challenged provision discriminates against the political rights

⁶ The court below did not address the question whether Amendment 73's ballot-access restrictions on congressional incumbents violate the First and Fourteenth Amendments. The court rejected an analogous challenge to the more severe restrictions imposed on state elected officials, however (see Pet. App. 19a-22a), so there is no reason to remand this case in order to permit that court to consider the same issue with respect to the less burdensome regulation of congressional incumbents.

of minor parties, independent candidates, or the indigent. In cases where the election law at issue does not unfairly restrict opportunity for disadvantaged political groups, the Court has routinely upheld the challenged law; in cases involving discrimination against such groups, however, the Court has not hesitated to strike down the offending regulation.

For example, in *Williams v. Rhodes*, 393 U.S. 23, 31 (1968), the Court concluded that the challenged laws gave the two major parties "a decided advantage over any new parties struggling for existence and thus place[d] substantially unequal burdens on both the right to vote and the right to associate." As a result, strict scrutiny was warranted "[i]n determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake." *Id.*; see *Norman v. Reed*, 112 S. Ct. 698, 705 (1992) (state laws severely "limiting the access of new parties to the ballot" are subject to strict scrutiny) (emphasis added); *Anderson v. Celebrezze*, 460 U.S. at 787, 793-94 & n.16, 804 (invalidating ballot-access measure that "does discriminate against independents").

Similarly, in *Bullock v. Carter*, 405 U.S. 134 (1972), the Court held that strict scrutiny was appropriate because the candidate-filing-fee requirement at issue in that case had a "patently exclusionary" effect that fell "with unequal weight on voters, as well as candidates, according to their economic status." *Id.* at 143, 144; see also *Lubin v. Panish*, 415 U.S. 709, 716 (1974) ("the process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars"). These cases demonstrate that the Court will closely scrutinize those laws that unfairly burden disadvantaged political groups, because "the primary values protected by the First Amendment—a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open—are served when election campaigns are not monopolized by the existing political parties." *Anderson v. Celebrezze*, 460 U.S. at 794 (footnote and citations omitted); see *Clements v.*

Fashing, 457 U.S. 957, 964-65 (1982) (opinion of Rehnquist, J.); see also L. Tribe, *American Constitutional Law* § 13-18, at 1097 (2d ed. 1988) ("the vigor of judicial review of election laws has been roughly proportioned to their potential for immunizing the current leadership from successful attack").

On the other hand, the Court has generally upheld those regulations that do not place unequal burdens on politically disadvantaged groups. For example, in *Storer v. Brown*, 415 U.S. at 733, the Court emphasized that the challenged ballot-access measure "involves no discrimination against independents." Similarly, in *American Party of Texas v. White*, 415 U.S. 767, 787-88 (1974), the Court rejected a challenge to a ballot-access law that "in no way freezes the status quo" and "affords minority political parties a real and essentially equal opportunity for ballot qualification." See also *Jenness v. Fortson*, 403 U.S. 431, 438, 442 (1971) (upholding election laws that "do not operate to freeze the political status quo" and "ha[ve] insulated not a single potential voter from the appeal of new political voices"); cf. *Burdick v. Takushi*, 112 S. Ct. at 2066 (write-in ban "politically neutral" because "there is nothing content based about a flat ban on all forms of write-in ballots.").

Amendment 73, of course, does not discriminate against minor parties, independent or economically disadvantaged candidates, or their supporters. To the contrary, Amendment 73 burdens only multi-term incumbents, a uniquely privileged class of individuals who have long enjoyed the "significant [political] advantages" of congressional office. *Buckley v. Valeo*, 424 U.S. at 31 n.33; see also J. Levy, *supra*, 80 Geo. L.J. at 1916.⁷ Moreover, Amendment 73 applies equally

⁷ The fact that discrimination against disadvantaged political groups generally invokes heightened judicial scrutiny does not support application of the same level of scrutiny to laws that, like Amendment 73, differentiate between advantaged and disadvantaged political groups

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to all multi-term congressional incumbents, regardless of their political affiliations or viewpoints.

That Amendment 73's burden on long-sitting Senators and Representatives is politically neutral and nondiscriminatory is made clear by this Court's decision in *Clements v. Fashing*, 457 U.S. 957 (1982). That case involved challenges to Texas constitutional provisions barring all state and federal officeholders from membership in the state legislature during their terms of office and requiring certain state officers to resign their positions before running for other elective office. The plurality opinion concluded that limitations on the candidacy rights of officeholders "do not contain any classification that imposes special burdens on minority political parties or independent candidates," do not "depend upon political affiliation or political viewpoint," and do not "burden[] access to the political process by those who are outside the 'mainstream' of political life." 457 U.S. at 965, 967 (opinion of Rehnquist, J.); see also *id.* at 972-73 (opinion of Court) (indicating that challenged classifications were not "invidious"); *id.* at 974 n.1 (Stevens, J., concurring in part and concurring in the judgment) ("The fact that appellees hold state office is sufficient to justify a restriction on their ability to run for other office that is not imposed on the public generally."). Thus, Amendment 73, which equally burdens all multi-term incumbents, is politically neutral and nondiscriminatory.

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by burdening only the former and by providing greater access and opportunity for the latter. Unlike laws based on racial classifications, which are always subject to strict scrutiny (even when they burden a racial majority) because of the invidious nature of such distinctions (see, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)), there is nothing invidious about discriminating against multi-term incumbents, a class defined not by "an immutable characteristic determined solely by the accident of birth" (*Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)), but rather by its entrenchment in office due to unmatched access to political power and government-conferred benefits.

2. Amendment 73 Imposes Only Minor Burdens On The Rights Of Candidates And Voters

Amendment 73 directly burdens only the opportunity of multi-term congressional incumbents to have their names listed on election ballots for the congressional offices previously held by them. Thus, the impact of the Amendment will be felt by, at most, only a handful of candidates, and even as to them it will apply only to the one congressional office (or, conceivably, the two offices) already occupied by those individuals for a substantial period of time. Long-term congressional incumbents remain wholly free to run for all other elective offices under precisely the same terms as every other candidate, and they are even permitted to run for reelection to the congressional office they previously held. In short, the restrictions imposed by Amendment 73 are *de minimis* as to both the number of candidates affected and the extent of the burden placed on those few individuals.⁸

Moreover, there is no fundamental right of candidacy (see *Clements v. Fashing*, 457 U.S. at 963 (opinion of Rehnquist, J.); *id.* at 977 n.2 (Brennan, J., dissenting); *Bullock v. Carter*, 405 U.S. at 142-143), and multi-term congressional incumbents are not a suspect class or an "identifiable political group whose members share a particular viewpoint, associational preference, or economic status." *Anderson v. Celebrezze*, 460 U.S. at 793; see *supra* note 7. Accordingly, any burden imposed by Amendment 73 on incumbents who wish to seek reelection to their congressional offices would not in itself justify heightened judicial scrutiny under any circumstances.

⁸ In addition, because Amendment 73 has not yet barred any Representative or Senator from the ballot, there is no basis on which to conclude that it will prevent multi-term incumbents from maintaining their seats once they become subject to its provisions. The opponents of Amendment 73 bear the burden of demonstrating that the burden it imposes is unduly severe (see *American Party of Tex.*, 415 U.S. at 790; *Storer*, 415 U.S. at 740; *Mandel v. Bradley*, 432 U.S. 173, 178 (1977) (per curiam)), and they cannot meet that burden in the absence of any actual experience with elections conducted under the Amendment.

Of course, "laws that affect candidates always have at least some theoretical, correlative effect on voters," *Anderson v. Celebrezze*, 460 U.S. at 786 (quoting *Bullock v. Carter*, 405 U.S. at 143), and thus it is necessary to consider as well the indirect impact of Amendment 73 on the rights of Arkansas voters. This Court's cases make clear, however, that the Amendment's effect (if any) on voting and associational rights falls far short of the type of burden required to justify invocation of strict scrutiny.

Amendment 73 does not in any manner limit the ability of Arkansas voters to vote for whomever they please in any election for local, state, or federal office. Nor does it impose an unequal burden on the ability of any particular political group to place on the ballot a candidate who supports the political views advocated by the members of the group. The *only* burden imposed on voters by Amendment 73, then, is that it may require supporters of a few individual candidates to cast write-in votes for those candidates rather than see their names printed on the ballot.⁹ Because the Amendment will reduce only slightly (if at all) the number of individuals eligible for inclusion on the ballot,¹⁰ it cannot be

⁹ Whatever the relevance of the write-in option in cases involving ballot-access restrictions on minor parties and independent candidates (compare, e.g., *Storer v. Brown*, 415 U.S. at 736 n.7 (relying on availability of write-in option as additional basis for upholding ballot-access restriction); *Jenness v. Fortson*, 403 U.S. at 438 (same); with *Anderson v. Celebrezze*, 460 U.S. at 799 n.26 (write-in option an "[in]adequate substitute" for having independent's name on ballot); *Lubin v. Panish*, 415 U.S. at 719 n.5 (dictum)), that option is likely to be of real significance for multi-term incumbents, who (unlike the typical independent or minor-party candidate) will virtually always enjoy widespread name recognition and well-developed fundraising capabilities.

¹⁰ Arkansas is entitled to elect two United States Senators and four Representatives. Even if each of those seats were consistently occupied by incumbents for the full number of terms established by Amendment 73, an average of only five individuals (one Senator and four Repre-

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deemed to impose so severe a burden on voters that strict scrutiny is warranted. *Cf. Bullock v. Carter*, 405 U.S. at 144 (imposing strict scrutiny where voters were “*substantially limited* in their choice of candidates” and the limitation “[e]ll more heavily on the less affluent segment of the community”) (emphasis added).

Amendment 73’s impact on the rights of voters must also be deemed minimal because there is no fundamental right to have the particular candidate of one’s choice listed on the ballot. *See Lubin v. Panish*, 415 U.S. at 716 (rejecting notion that “every voter can be assured that a candidate to his liking will be on the ballot”).¹¹ Provisions that, like Amendment 73, merely exclude from the ballot a particular class of individuals defined in a non-invidious manner do not require heightened judicial scrutiny because they do not implicate the core concerns of the First and Fourteenth Amendments.

Anderson v. Celebrezze demonstrates this point clearly. In that case, the Court observed that, “although candidate eligibility requirements may exclude particular candidates, it remains possible that an eligible candidate will ‘adequately reflect the perspective of those who might have voted for a candidate who has been excluded.’ But courts quite prop-

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representatives) would become disqualified from access to the ballot every six years. This Court’s cases provide no support for the notion that a law disqualifying (on a politically neutral basis) less than one person per year from access to the ballot imposes a “severe” restriction on the rights of voters.

¹¹ Indeed, there is not even a fundamental right to vote for the particular individual of one’s choice. *See Burdick v. Takushi*, 112 S. Ct. at 2065-66 (rejecting claim that voter is entitled to cast “a ‘protest vote’ for Donald Duck,” and concluding that an absolute “ban on write-in voting imposes only a limited burden on voters’ rights”). Of course, the burden imposed on the rights of voters by Amendment 73 is far less severe than that at issue in *Burdick*, because Arkansas voters remain free to cast write-in votes even for multi-term congressional incumbents if they so choose.

erly ‘have more carefully appraised the fairness and openness of laws that determine which political groups can place *any* candidate of their choice on the ballot.’” 460 U.S. at 793 n.15 (citations omitted); *see also id.* at 792 n.12 (distinguishing *Storer v. Brown*, which upheld a state law barring certain candidates from access to the ballot, because “[a]lthough [the provision at issue in *Storer*] may preclude such voters from supporting a particular ineligible candidate, they remain free to support and promote other candidates who satisfy the State’s [ballot-access] requirements”).

Amendment 73 does not “determine which political groups can place *any* candidate of their choice on the ballot.” It merely disqualifies a small number of individuals from the ballot, and leaves all political groups and parties equally free to place on the ballot any other candidates who reflect their views. Accordingly, the minor burdens it imposes on the rights of voters do not justify heightened judicial scrutiny.

B. The Important State Interests Served By Amendment 73 Are Plainly Sufficient To Justify Its Minimal Burden On Protected Rights

Amendment 73 serves a number of important state interests, any one of which is more than sufficient to justify its minimal intrusion on the rights of candidates and voters. In particular, the Amendment is precisely calculated to further the legitimate, and indeed compelling, state interests in ensuring the fairness and integrity of elections and preserving openness and competition in the political marketplace. *See, e.g., Burdick v. Takushi*, 112 S. Ct. at 2063 (“there must be a substantial regulation of elections if they are to be fair and honest”); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990); *Eu v. San Francisco Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (“A State indisputably has a compelling interest in preserving the integrity of its election process. Toward that end, a State may enact laws . . . when necessary to ensure that elections are fair and honest.”) (citation omitted); *Anderson v. Celebrezze*,

460 U.S. at 794; *Oregon v. Mitchell*, 400 U.S. 112, 288 (1970) (opinion of Stewart, J.) ("The States . . . are free to pass such laws as are necessary to assure fair elections."); *Williams v. Rhodes*, 393 U.S. at 32 ("Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.").

As the people of the State of Arkansas have found, "[e]ntrenched incumbency has . . . led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers." Pet. App. 68a.¹² The astonishingly high rate of reelection for congressional incumbents, particularly in the House of Representatives, is well documented,¹³ and there is little doubt that the explanation for that political longevity can be found in the benefits provided to multi-term incumbents by virtue of their government positions.

¹² The Founders certainly did not anticipate that the reelection rate for Members of the House of Representatives would routinely approach or exceed 90 percent. See *infra* note 13. Madison believed that only "[a] few of the members" would be reelected repeatedly, and that "[t]he election of the representatives by the people would not be governed by the same principle" as had been applicable under the Articles of Confederation, where the reelection of each State's congressional delegates was "considered by the legislative assemblies almost as a matter of course." *The Federalist* No. 53, at 364-65 (J. Madison) (J. Cooke ed. 1961). See also *id.* No. 37, at 234 (J. Madison) ("A frequent change of men will result from a frequent return of electors, and a frequent change of measures, from a frequent change of men"); *id.* No. 61, at 413 (A. Hamilton) (arguing that a uniform election date for the House would serve as a "security against the perpetuation of the same spirit in the body").

¹³ See, e.g., J. Levy, *supra*, 80 Geo. L.J. at 1916-17 (House reelection rates were 96% in 1990, 98% in 1988, 98% in 1986); Note, *The Constitutionality of State-Enacted Term Limits Under the Qualifications Clauses*, 71 Tex. L. Rev. 865, 866 n.7 (1993) (88% in 1992); N. Gorsuch & M. Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitations*, 20 Hofstra L. Rev. 341, 384 (1991) (table demonstrating dramatic decline in House turnover rates from 1790 to 1988).

This Court recognized in *Buckley v. Valeo* that the "significant advantages" of incumbency include "voter recognition," "the status accruing to holding federal office," "access to substantial resources provided by the Government," and other well-known and substantial benefits. 424 U.S. at 31 n.33. Multi-term incumbents also enjoy overwhelming advantages in fundraising and access to the media. See, e.g., J. Levy, *supra*, 80 Geo. L.J. at 1916. Many of these advantages are conferred directly by the government, and all of them are at least indirectly attributable to the fact that multi-term incumbents enjoy positions of public trust and influence.

This overwhelming array of government-conferred political advantages bolsters the electoral strength of multi-term incumbents in ways wholly unrelated to the appeal of their political views. Cf. *Austin v. Michigan Chamber of Commerce*, 494 U.S. at 660. State action aimed at reducing these unfair advantages is plainly consistent with the legitimate government interests in promoting the fairness, integrity, openness, and competitiveness of elections; indeed, there is considerable force to the argument that the *failure* to take such steps poses a greater threat to First and Fourteenth Amendment values, because it ignores the reality that challengers are simply not in the same position as multi-term incumbents who have long enjoyed the special political advantages of congressional office. See *Anderson v. Celebrezze*, 460 U.S. at 801 ("[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike").

Thus, Amendment 73 is a necessary response to the present imbalance in the electoral system, an imbalance caused in large part by congressional legislation and other factors that are beyond the power of individual States to eliminate. To be sure, the voters of Arkansas have always possessed the power to vote individual multi-term incumbents out of office, but Amendment 73 provides a more complete and permanent solution to the systemic problem of entrenched incumbency. Just as the citizens of this Nation chose to

adopt the First Amendment and other provisions of the Bill of Rights in order to restrain the potential tyranny of future political majorities, so the people of the State of Arkansas have adopted a self-limiting measure that ensures that future electoral majorities will not be unduly swayed by the powerful political advantages enjoyed by multi-term incumbents.

Amendment 73 imposes a narrow, reasonable, and measured burden on the political opportunity of a few individuals and thereby levels the political playing field for all voters and candidates. Because the effect of the Amendment is to eliminate the special advantages of long-term incumbency, it will necessarily render congressional elections more fair and open, thereby encouraging political debate and involvement by new candidates, voters, and political parties—a result that is consistent with, and serves to foster, “the primary values protected by the First Amendment.” *Anderson v. Celebrezze*, 460 U.S. at 794. In short, Amendment 73 directly furthers the legitimate governmental interests in the fairness, integrity, and openness of congressional elections without discriminating against any political viewpoint or politically disadvantaged group, and accordingly it should be upheld. See *Burdick v. Takushi*, 112 S. Ct. at 2066 (“[W]e have repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls.”).¹⁴

¹⁴ Indeed, this Court has already held, albeit summarily, that state laws analogous to Amendment 73 do not raise significant constitutional concerns. In *State ex rel. Maloney v. McCartney*, 223 S.E.2d 607 (W. Va.), appeal dismissed for want of subst’l fed’l question, 425 U.S. 946 (1976), the Supreme Court of Appeals of West Virginia rejected an incumbent governor’s federal constitutional challenge to a state constitutional provision rendering him ineligible for reelection during the four years following his second term in office. The governor appealed to this Court, presenting for review the questions whether the state constitutional provision “deprives West Virginia voters of equal protection of the law in violation of the Fourteenth Amend-

[Footnote continued on following page]

CONCLUSION

The judgment of the Supreme Court of Arkansas should be reversed.

Respectfully submitted.

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August 16, 1994

[Footnote continued from previous page]

ment” and “deprives a Governor who desires to seek a third consecutive term of freedom of expression and association in violation of the First and Fourteenth Amendments.” J.S. in *Moore v. McCartney*, No. 75-1493, at 3. Finding those federal constitutional questions too inconsequential to merit plenary review, this Court dismissed for want of a substantial federal question. 425 U.S. 946. This decision is, of course, “entitled to precedential weight,” *Meek v. Pittenger*, 421 U.S. 349, 367 n.16 (1975), and provides strong support for the conclusion that Amendment 73 does not violate the First and Fourteenth Amendments. Accord, e.g., *Legislature v. Eu*, 54 Cal. 3d 492, 286 Cal. Rptr. 283, 816 P.2d 1309 (1991), cert. denied, 112 S. Ct. 1292 (1992); *Maddox v. Fortson*, 172 S.E.2d 595 (Ga.), cert. denied, 397 U.S. 149 (1970).

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QUESTION PRESENTED

Whether Article I, § 2, cl. 2 and Article I, § 3, cl. 3 of the Constitution, which set forth minimum age, citizenship, and residency qualifications for members of the U.S. House of Representatives and U.S. Senate, respectively, bar the people of the several States from limiting the number of terms which their representatives in Congress can serve?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	(i)
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL PROVISIONS	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE CONSTITUTION'S TEXT, STRUCTURE, AND HISTORY DEMONSTRATE THAT STATES MAY ADD QUALIFICATIONS TO THOSE SPECIFIED IN ARTICLE I	4
II. THE PARADE OF HORRIBLES TRADI- TIONALLY RELIED ON BY ADVOCATES OF THE POSITION EMBRACED BY THE ARKANSAS COURT ARE READILY ADDRESSED UNDER THE COURT'S RECENT DECISIONS.	10
III. THE THEORY OF THE CONSTITUTION REQUIRES THAT AMBIGUITY BE RESOLVED IN FAVOR OF ARKANSANS' ABILITY TO ALTER THE SYSTEM BY WHICH THEY CHOOSE THEIR REPRESENTATIVES IN CONGRESS.	12
CONCLUSION	16

TABLE OF AUTHORITIES

Cases	Page
<i>Baker v. Carr</i> , 369 U.S.186 (1962)	12
<i>Barnes v. First Parish</i> , 6 Mass. 334 (1810)	9
<i>Bernal v. Fainter</i> , 467 U.S. 216 (1984)	15
<i>Burdick v. Takushi</i> , 112 S. Ct. 2059 (1992)	12
<i>Collector v. Day</i> , 78 U.S. 113 (1870)	16
<i>Graves v. New York ex rel. O'Keefe</i> , 306 U.S. 466 (1939)	16
<i>Gregory v. Ashcraft</i> , 501 U.S. 452 (1991)	15
<i>In re Duncan</i> , 139 U.S. 449 (1891)	15
<i>Luther v. Borden</i> , 48 U.S. 1 (1849)	11
<i>New York v. United States</i> , 112 S.Ct. 2408 (1992)	13
<i>Powell v. McCormick</i> , 395 U.S. 486 (1969)	7
<i>Wesberry v. Sanders</i> , 376 U.S. 1 (1964)	12
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968)	12
<i>Yick Wo v. Hopkins</i> , 118 U. S. 356 (1886)	13

Constitutions and Statutes

Mass. Const. Pt. 1, Art. III (1780)	9
U.S. Const. art. I, § 2, cl. 1	passim
U.S. Const. art. I, § 2, cl. 2	passim
U.S. Const. art. I, § 2, cl. 3	passim
U.S. Const. art I, § 6, cl. 2	5
U.S. Const. art I, § 10, cl. 1	9
U.S. Const art. III, cl. 3	8
U.S. Const. art. IV, § 4	11
U.S. Const. art. VI, cl. 3	6
U.S. Const. amend. I	11
U.S. Const. amend. V	9
U.S. Const. amend. VI	9
U.S. Const. amend. X	13
U.S. Const. amend. XIV	11
U.S. Const. amend. XIV, § 3	5
Articles of Confederation Art. 13, 1 Stat. 8	14
Articles of Confederation, 1 Stat 4 (1777)	13

Dec. of Ind. para. 2	13
Ga. Act of Jan. 23, 1789	7
N.C. Act of Dec. 16, 1789, ch. 1, § 1	7
Va. Act of Nov. 20, 1788, ch. 2, § 1	7

Miscellaneous

M. Clarke and D. Hall, <i>Cases of Contested Elections in the House of Representatives</i> (1834)	5
Thomas M. Cooley, <i>The General Principles of Constitutional Law in the United States of America</i> 257 (1880)	11
2 Max Farrand, <i>The Records of the Federal Convention of 1787</i> (Yale 1937)	5
Joseph Story, <i>Commentaries on the Constitution of the United States</i> § 624 (1833), <i>reprinted in 5 The Founders' Constitution</i> 843 (1987)	11
Charles Warren, <i>The Making of the Constitution</i> (1937)	11

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

Nos. 93-1456 and 93-1828

U.S. TERM LIMITS, INC., *et al.*, *Petitioners*,

v.

RAY THORNTON, *et al.*, *Respondents*.

STATE OF ARKANSAS *ex rel.* WINSTON BRYANT,
Attorney General of the State of Arkansas, *Petitioner*,

v.

BOBBIE E. HILL, *et al.*, *Respondents*.

On Writ of Certiorari to the
Supreme Court of Arkansas

**BRIEF FOR RESPONDENTS
REPUBLICAN PARTY OF ARKANSAS
AND W. ASA HUTCHINSON
SUPPORTING PETITIONERS**

Pursuant to Rules 12.4 and 24.2 of the Rule of this
Court, respondents Republican Party of Arkansas and W. Asa
Hutchinson, Chairman of the Republican Party of Arkansas

and member of the Arkansas State Board of Election Commissioners, respectfully submit this brief in support of petitioners. Respondents adopt by reference the portions of the brief of the State Petitioner in No. 93-1828 containing the matters required by this Court's Rule 24.1(b), (d), (e), and (g).

CONSTITUTIONAL PROVISIONS

Respondents adopt by reference the portions of the brief of the State Petitioner in No. 93-1828 containing the matters required by this Court's Rule 24.1(f), with the addition of the following provisions:

Article IV, § 4

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Amendment I

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV, § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SUMMARY OF ARGUMENT

The implausible reading of the Constitution's Article I § 2, cl. 2 and § 3, cl. 3 adopted below is indefensible. It conflicts with the Constitution's text, structure, and history. It ignores the theoretical foundations of the American government. And if such a strained interpretation was ever necessary to protect the Republic against possible anti-republican assault, as some have claimed, that day is now long past. The decision below must be overturned.

ARGUMENT

I. THE CONSTITUTION'S TEXT, STRUCTURE, AND HISTORY DEMONSTRATE THAT STATES MAY ADD QUALIFICATIONS TO THOSE SPECIFIED IN ARTICLE I.

The Arkansas court appeared to believe that it is an open question whether Article I forbids states from adding qualifications for its elected representatives to Congress. In fact, the evidence, fairly considered, proves the opposite. Consider the following.

First, the criteria in Article I, § 2, cl. 2 and § 3, cl. 3 are not "Qualification Clauses"; rather, they are *Disqualification Clauses*. Each provision, phrased in the negative ("no Person shall be a Representative [or Senator] who shall not have attained" minimum age, citizenship, and inhabitancy requirements), stands in marked contrast to the affirmatively phrased Voter Qualifications Clause, which immediately precedes the Disqualification Clause of Article I, § 2.

The significance of this important language difference was recognized by the founding generation. In 1807, for example, Representative John Randolph of Virginia stated during a House debate over the contested election case of *Barney v. McCreery*:

Mark the distinctions between the first and second paragraphs [of Art. I, § 2]. The first is affirmative and positive. "They shall have the qualifications necessary to the electors of the most numerous branch of the State Legislature." The second merely negative. "No person shall be a Representative who shall not have attained the age of twenty-five years," &c. No man could be a member without these requisites; but it did not follow that he who had them was entitled to set at naught such other

requisites as the several States might think proper to demand. If the constitution had meant (as was contended) to have settled the qualification of members, its words would have naturally ran thus: "*Every person* who has attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall, when elected, be an inhabitant of the State from which he shall be chosen, shall be eligible to a seat in the House of Representatives."

M. Clarke and D. Hall, *Cases of Contested Elections in the House of Representatives*, 178-79 (1834) ("*Contested Elections*"); see also *id.* at 185 (Rep. Bibb) ("The language [of Art. I, § 2, cl. 2] was not such, according to legal construction, as to induce the House to say that the State authorities might not require other qualifications.").

Second, the founders—specifically, the Constitutional Convention's Committee on Style—deliberately adopted negative phrasing in the Disqualification Clauses to make those provisions work in parallel with other constitutional provisions. The Committee on Style's charter was to "revise the stile of and arrange the articles which had been agreed to by the House." 2 Max Farrand, *The Records of the Federal Convention of 1787*, 553 (Yale 1937) ("*Farrand*"). As a result, the negative phrasing of the Disqualification Clauses—"no Person shall be a Representative [or Senator]"—echoes similar negative phrasing in another Article I disqualification provision, the Incompatibility Clause. See U.S. Const. Art I, § 6, cl. 2 ("*no Person* holding any Office under the United States, *shall be a Member of either House* during his Continuance in Office") (emphasis added); Cf. U.S. Const. amend. XIV, § 3 ("*No person shall be a Senator or Representative in Congress . . . who, having previously taken an oath . . . to support the Constitution of the United States*

shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof") (emphasis added).

By settling on uniform, negative phrasing for the Article I, § 2, § 3, and § 6 clauses, the Convention, under the direction of the Committee on Style, plainly intended to contrast these provisions with the affirmative prerequisites for admission to Congress set forth elsewhere in the Constitution. *See, e.g.*, Article I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States"); Article VI, cl. 3 (The Senators and Representatives before mentioned . . . shall be bound by Oath or Affirmation, to support this Constitution"). As a textual matter, therefore, the suggestion that Article I, §§ 2 and 3 set *exclusive* qualifications is no more compelling than an argument that the Incompatibility Clause or section 3 of the Fourteenth Amendment set exclusive qualifications. The fact that these multiple provisions are phrased in parallel terms refutes the claim that the disqualifications appearing in any one were intended to be "exclusive."

Third, the original version of the Disqualification Clauses, as set forth at the Convention in the Virginia Plan, included express language making the affirmative qualifications specified in that draft of the clause exclusive. *See 2 Farrand* at 139 ("delegates shall be the age of twenty five years at least, and citizenship: *(and any person possessing these qualifications may be elected except)*") (emphasis added). Therefore, the Convention's substitution of the open-ended, negative phrasing in Article I, § 2, cl. 2 and § 3, cl. 3 can only be read as rejecting exclusive qualifications.

Fourth, the Disqualification Clauses' interpretation in the immediate post-ratification period confirms that they were understood to specify minimum, not exclusive, disqualifications. Significantly, many States adopted additional qualifications immediately after the ratification of the

Constitution. *See, e.g.*, Va. Act of Nov. 20, 1788, ch. 2, § 1 (property and district residency requirements); Ga. Act of Jan. 23, 1789 at 247 (district residency); N.C. Act of Dec. 16, 1789, ch. 1, § I (district residency). Moreover, the so-called "*McCreery*" case, the historical episode cited most often in defense of the exclusivity of the Disqualification Clauses, actually demonstrates the opposite. In this regard, both this Court and the court below have confused the meaning of *McCreery* by citing as authoritative a committee report *rejected* by the House of Representatives as a whole. *See Powell v. McCormick*, 395 U.S., 486, 542-43 (1969); *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 356 (1994) (plurality opinion).

McCreery occasioned the first comprehensive congressional debate over the meaning of the Article I Disqualification Clauses. It occurred in 1807, when the House considered a contested election between Joshua Barney and William McCreery, in which Mr. Barney disputed whether Mr. McCreery, the apparent victor, resided in the City of Baltimore, as he was required to do by a Maryland law setting district residency as a prerequisite for service in Congress. In an initial report, the House Committee of Elections recommended that McCreery be seated on grounds that "the qualifications of members are . . . determined [in the Constitution], without reserving any authority to State Legislatures to change, add to, or diminish those qualifications." *Contested Elections* at 168. But "[o]n the consideration of this report in a Committee of the Whole House, a debate arose, and was continued several days, and terminated at length by the recommitment of the report to the Committee of Elections." *Id.* at 169. The report was then revised so as to delete all reference to constitutional issues and focus instead on the issue of where Mr. McCreery in fact resided. *Id.* at 169-71.

After the submission of the new report, the House seated Mr. McCreery by a resolution stating only, "*Resolved*,

That William McCreery is entitled to his seat in this House.” *Id.* at 171. Of those who voted to seat McCreery, some clearly believed that he was a resident of Baltimore and therefore qualified under Maryland law. *See, e.g., id.* at 185, 200 (Rep. Bibb); *id.* at 186 (Rep. Montgomery). Others thought that the Maryland law was unconstitutional. *See, e.g., id.* at 187 (Rep. Alston). Still others suggested that perhaps a State legislature could not impose additional qualifications, but that the people themselves could impose additional qualifications as the people of Arkansas did in this case. *See, e.g., id.* at 193 (Rep. Johnson) (“Would any power less than a convention of the State of Maryland assume the right of adding a disqualification?”). In sum, the only certainty emerging from the *McCreery* debate is that a House majority was unwilling to embrace the proposition that States lack power to add disqualifications to those appearing in Article I.

Fifth, the Constitution’s Article VI, cl. 3 also demonstrates that the Disqualification Clauses are not exclusive. That clause provides:

The *Senators and Representatives* before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office of public Trust under the United States.

U.S. Const. art. VI, cl. 3 (emphasis added).

When this provision was first introduced, it required only that members of Congress and other state and federal officers take an oath to support the Constitution. Two weeks after Congress adopted the final wording of the Article I, § 2 Disqualification Clause, however, the Convention amended this

Article VI clause, adding the phrase, “But no religious test shall ever be required as a qualification to any office of public trust under the United States.” 2 *Farrand* at 461.

The formulation, “any Office of public Trust under the United States,” naturally encompasses the federal legislative, executive, and judicial officers mentioned in the first half of the clause, while omitting state officers, and thus leaving open the possibility of religious establishments in the States. *Cf.* Mass. Const. Pt. 1, Art. III (1780); *Barnes v. First Parish*, 6 Mass. 334, 338 (1810) (recognizing that the Massachusetts Constitution established the Congregational Church). But this express prohibition of religious tests for, *inter alia*, “Senators and Representatives,” would have been unnecessary had the Article I disqualifications been considered exclusive. The Convention’s decision explicitly to forbid this one type of additional qualification is therefore compelling evidence that other additional qualifications were envisioned and not foreclosed by Article I.

Finally, the Tenth Amendment specifies the rule of construction for constitutional prohibitions on State power. It provides: “The powers not . . . prohibited by [the Constitution] to the States, are reserved to the States respectively, or to the people.” Under this rule, prohibitions on State power must be limited to their terms. By reserving to the States all powers not prohibited them by the Constitution itself, the rule forbids courts from construing the Constitution so as to prevent States from adopting limitations going beyond those expressed in the document. Were the rule otherwise, then the lengthy list of prohibitions relating to States’ enforcement of the criminal law—*see, e.g.,* U.S. Const. art I, § 10, cl. 1 (prohibiting states from “pass[ing] any Bill of Attainder”); *id.* (prohibiting states from “pass[ing] any . . . ex post facto law”); *id.* Amend. V (Double Jeopardy Clause); *id.* (prohibition on self-incrimination); *id.* (Due Process Clause); *id.* Amend. VI (trial by jury); *id.* (Confrontation Clause)—could be construed as

exhaustive, with the States in danger of being prohibited from providing additional rights to criminal defendants in their constitutions. As a textual matter, the argument that the constitutional disqualification provisions are exhaustive is no more compelling than this unpersuasive argument that States are barred from providing additional rights to criminal defendants.

II. THE PARADE OF HORRIBLES TRADITIONALLY RELIED ON BY ADVOCATES OF THE POSITION EMBRACED BY THE ARKANSAS COURT ARE READILY ADDRESSED UNDER THE COURT'S RECENT DECISIONS.

As demonstrated above, any textual, structural, or historical argument for the exclusivity of the Article I Disqualification Clauses is weak. A more superficially persuasive argument is the parade of horrors that is often predicted if the clauses are given their natural (and intended) reading. As one participant in the *McCreery* debate argued:

If [the Maryland Legislature] had the power of restricting the choice of Representatives as to place, why not as to other qualifications? They might say that no man was qualified to serve as a Representative . . . who was not a farmer, a mechanic, or of any other profession. . . . The State Legislature might enact that no person should be a Representative who was not a federalist If the Legislature determined that members from the State of Maryland should possess a certain [large] property . . . would it not be verging toward aristocracy? If they were to say that all members of the State should be chosen from the town of Baltimore would it not appear absurd? And yet they had as much right to do this as to say that each

member should be a resident of a particular district.

Contested Elections at 188-89 (Rep. Rowan).

The prospect of such horrors perhaps explains the willingness of eminent, bygone jurists to distort the Disqualification Clauses in order to limit States' power to set qualifications for election to Congress. See, e.g., 2 Joseph Story, *Commentaries on the Constitution of the United States* § 624 (1833), reprinted in 5 *The Founders' Constitution* 843 (1987) (qualifications specified in Article I are exclusive); Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 257 (1880) (same); Charles Warren, *The Making of the Constitution* 420-22 & n.1 (1937) (same). In their own day, such jurists viewed a constitutional landscape on which these Clauses, twisted to serve the purpose, stood as lonely bulwarks against a possible anti-republican assault on Congress through the specification of restrictive electoral qualifications. To be sure, Rep. Rowan's *McCreery* speech noted the possibility that the Guaranty Clause, U.S. Const. art. IV, § 4, might be used to repel such assaults. See *Contested Elections* at 188 (Rep. Rowan). By mid-nineteenth century, however, this prospect, always conjectural, had been foreclosed. See *Luther v. Borden*, 48 U.S. 1, 42-43 (1849) (holding that issues arising under the Guaranty Clause are political questions not resolvable by the courts). From that time until more than a century later, constitutional law had no ready answer for Representative Rowan's fears.

As this Court's interpretation of the Fourteenth and First Amendments has evolved, however, Rowan's horrors no longer apply. Each monster in his parade is now well-confined by settled doctrine, quite apart from the Disqualification Clauses. Beginning after *Baker v. Carr*, this Court has subjected laws affecting the conduct of elections to demanding constitutional scrutiny under Article I, § 2, cl. 1 and the First

and Fourteenth Amendments. See *Baker v. Carr*, 369 U.S. 186, 209 (1962) (holding that constitutional challenges to malapportioned legislatures do not present nonjusticiable “political questions”); see also, e.g., *Wesberry v. Sanders*, 376 U.S. 1 (1964) (congressional districting scheme invalidated on constitutional grounds); *Williams v. Rhodes*, 393 U.S. 23 (1968) (ballot access scheme for presidential election invalidated on constitutional grounds); *Burdick v. Takushi*, 112 S. Ct. 2059, 2063 (1992) (“[T]he rigorousness of our inquiry into the propriety of a state election law depends on the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.”). Through these doctrines, the Court has reduced Rowan’s horrors to spectres—and answered the hoary argument that once might have favored an unnatural reading of the Disqualification Clauses. Today, it is unpersuasive to claim that the Court must twist these Clauses to protect the Republic.

III. THE THEORY OF THE CONSTITUTION REQUIRES THAT AMBIGUITY BE RESOLVED IN FAVOR OF ARKANSANS’ ABILITY TO ALTER THE SYSTEM BY WHICH THEY CHOOSE THEIR REPRESENTATIVES IN CONGRESS.

The issue before this Court is not whether the national Constitution delegates to States or their people a power to add to the list of electoral qualifications for Congress. It is whether the people of Arkansas, in concert with the people of the rest of the nation, have delegated away that power in enacting the federal Constitution. The plurality below believed that the question of “whether the states are foreclosed from adding a restriction to candidacy in the form of service limitations is not specifically addressed” by the Constitution. 872 S.W.2d at 356. But if that is so, then the plurality’s conclusion—that the authority to limit terms “is not [one] left to the states under the Tenth Amendment,” *id.* at 357—must be false. Under the

structure of our government, as under the Tenth Amendment, “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. amend. X; see also *New York v. United States*, 112 S.Ct. 2408, 2418 (1993) (same).

The Declaration of Independence articulated the principle that just governments are instituted through the consent of the governed to protect inalienable rights with which human beings are endowed. Dec. of Ind. para. 2. The Declaration also stated a necessary corollary to that principle: “That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.” *Id.*

The Constitution rests firmly on these fundamental principles of popular sovereignty. As this Court has recognized, the Constitution “is but the body and the letter of which the [Declaration] is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence.” *Yick Wo v. Hopkins*, 118 U. S. 356, 369 (1886). Thus, in 1787, the people of the United States exercised their sovereign right to alter their former government, which at the time consisted of a delegation of power to thirteen states that had in turn formed a national confederation. See Articles of Confederation, 1 Stat 4 (1777). The 1787 convention was called under the authority of that confederation, but once convened, derived its authority directly from the people. Thus, the new constitution was legitimated not by the amendment provisions of the Articles of Confederation—which it in fact violated—but by the authority

of the people, as is confirmed by the first words of the Constitution's Preamble: "We the People."¹

Yet the new government did not simply replace the old one. Rather, a new mechanism in the science of politics was deployed, through which the People, as ultimate sovereign, divided governmental authority, delegating some to the new national government, while continuing to delegate other authority to the existing States. See, e.g., James Wilson, speech in Pennsylvania Ratifying Convention, 4 Dec. 1787, reprinted in 1 *The Founders' Constitution* at 62 ("[The people] can delegate [such power] in such proportions, to such bodies, on such terms, and under such limitations, as they think proper."); see also *Barney v. McCreery*, reprinted in *Contested Elections* at 202 (Rep. Quincy) (Congress and the States both derive their authority from the people). Of course, this idea of divided, delegated authority required a recognition that the people themselves can operate in different capacities at the same time. As James Wilson described the process to the Pennsylvania Ratifying Convention:

I consider the people of the United States as forming one great community, and I consider the people of the different States as forming communities again on a lesser scale. From this great division of the people into distinct communities it will be found necessary that different proportions of legislative powers should be given to the governments, according

¹ Cf. Articles of Confederation Art. 13, in 1 Stat. at 8 ("[T]he articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and shall afterwards be confirmed by the Legislatures of every State.") (emphasis added).

to the nature, number and magnitude of their objects.

Unless the people are considered in these two views, we shall never be able to understand the principle on which this system was constructed.

James Wilson, Speech in Pennsylvania Ratifying Convention, 4 Dec. 1787, reprinted in 1 *The Founders' Constitution* at 62 citing Declaration of Independence para. 2.

Under this regime, the sovereign people act simultaneously as a national community and through separate state communities. In this manner, the people must, when expressing their sovereign will at the state level, be entitled to regulate the mechanisms through which they choose their national representatives, subject only to the express constraints that they to have imposed on themselves through the national community. See, e.g., *In re Duncan*, 139 U.S. 449, 461 (1891) ("the distinguishing feature 'of a republican form of government' is the right of the people to choose their own officers for governmental administration, and pass their own laws."); *Gregory v. Ashcraft*, 501 U.S. 452, 463 (1991) quoting *Bernal v. Fainter*, 467 U.S. 216, 221 (1984) (The authority of the people of the States to determine the qualifications of their most important government officials "go[es] to the heart of representative government. . . . It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States 'guarantee[s] to every State in this Union a Republican Form of Government.'").

Consequently, the admission below that the Constitution does not specifically forbid the imposition of additional qualifications should have been dispositive. The structure of our government, like the Tenth Amendment's canon of construction, requires that the people in their state communities be permitted to exercise all power not expressly

withdrawn through the national Constitution. *See, e.g., Collector v. Day*, 78 U.S. 113, 124 (1870), *overruled on other grounds by Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 486 (1939) ("It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States."). Because it ignored this simple, fundamental rule, the court below concluded erroneously that Arkansans were powerless in the face of the erosion of their republican institutions.

CONCLUSION

The Arkansas Supreme Court's ruling that Amendment 73 to the Arkansas Constitution is invalid under Article I of the Constitution should be reversed, and the case should be remanded for consideration of respondents' challenges to Amendment 73 under the First and Fourteenth Amendments.

Respectfully submitted,

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Dated: August 16, 1994

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

U.S. TERM LIMITS, INC., *et al.*,
v. *Petitioners,*

RAY THORNTON, *et al.*,
Respondents.

STATE OF ARKANSAS *ex rel.* WINSTON BRYANT,
Attorney General of the State of Arkansas,
v. *Petitioner,*

BOBBIE E. HILL, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of Arkansas

**BRIEF OF RESPONDENTS BOBBIE E. HILL,
ON BEHALF OF THE LEAGUE OF WOMEN VOTERS
OF ARKANSAS, AND DICK HERGET**

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October 17, 1994

QUESTIONS PRESENTED

1. Whether a state may add to the qualifications for service in Congress expressly prescribed in the Constitution.
2. Whether a state may bar from the ballot for election to Congress, for life, constitutionally qualified candidates who have complied with all federal and state requirements relating to the election process.

RULE 29.1 LISTING

Respondent the League of Women Voters of Arkansas is a non-profit corporation incorporated under the laws of the State of Arkansas. It has no parent companies or subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.1 LISTING	ii
TABLE OF AUTHORITIES	v
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE CONSTITUTION BARS STATES (AND CONGRESS) FROM ADDING TO THE QUALIFICATIONS FOR SERVICE IN CONGRESS..	6
A. <i>Powell v. McCormack</i> Decided That the Qualifications Set Forth in the Constitution Are Exclusive	7
B. The <i>Powell</i> Court's Interpretation of the Constitution Was Correct	11
1. The Founders Believed That the Constitutional Qualifications Are Exclusive and Unalterable by the States	11
2. The Early Congresses Recognized That States Could Not Add Qualifications.....	21
3. All the Prominent Early Constitutional Scholars and a Large and Unanimous Number of Courts Have Interpreted the Constitution as Barring the States (and Congress) From Adding Qualifications....	24
II. CALLING THE ARKANSAS MEASURE A "MERE BALLOT ACCESS" MEASURE DOES NOT SAVE IT FROM UNCONSTITUTIONALITY	27

TABLE OF CONTENTS—Continued

	Page
A. The Arkansas Measure Is Invalid Because It Violates the Principle That States May Not Add Qualifications	28
B. The Arkansas Measure Is Invalid Because a State Does Not Have the Power To Exclude a Qualified Candidate (Who Has Complied with All Applicable Election-Related Requirements) From the Ballot	32
1. State Power Under the TPM Clause.....	32
2. State "Reserved" Powers	38
CONCLUSION	41
APPENDIX	1a

TABLE OF AUTHORITIES

FEDERAL CASES	Page
<i>American Party of Texas v. White</i> , 415 U.S. 767 (1974)	36, 37
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	29, 33, 37
<i>Boyd v. Nebraska ex rel. Thayer</i> , 143 U.S. 135 (1892)	38
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	10, 31, 32
<i>Burdick v. Takushi</i> , 112 S. Ct. 2059 (1992)	29, 33, 37
<i>Burton v. United States</i> , 202 U.S. 344 (1906)	23
<i>Citizens Against Rent Control v. City of Berkeley</i> , 454 U.S. 290 (1981)	29
<i>City of Ladue v. Gilleo</i> , 114 S. Ct. 2038 (1994)	35
<i>Clements v. Fashing</i> , 457 U.S. 957 (1982)	40
<i>Davis v. Adams</i> , 400 U.S. 1203 (1970)	10
<i>Dillon v. Fiorina</i> , 340 F. Supp. 729 (D.N.M. 1972)	20
<i>Eu v. San Francisco County Democratic Central Committee</i> , 489 U.S. 214 (1989)	36
<i>Exon v. Tiemann</i> , 279 F. Supp. 609 (D. Neb. 1968)	20
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991)	38
<i>Hopfmann v. Connolly</i> , 746 F.2d 97 (1st Cir. 1984), vacated, 471 U.S. 459 (1985)	31
<i>Hunter v. Erickson</i> , 393 U.S. 385 (1969)	29
<i>Joyner v. Mofford</i> , 706 F.2d 1523 (9th Cir.), cert. denied, 464 U.S. 1002 (1983)	11, 40
<i>Kusper v. Pontikes</i> , 414 U.S. 51 (1973)	37
<i>Lubin v. Panish</i> , 415 U.S. 709 (1974)	29, 37
<i>Lucas v. Forty-Fourth General Assembly of Colorado</i> , 377 U.S. 713 (1964)	29
<i>McCarthy v. Briscoe</i> , 429 U.S. 1317 (1976)	37
<i>Munro v. Socialist Workers Party</i> , 479 U.S. 189 (1986)	33, 36, 37
<i>New York v. United States</i> , 112 S. Ct. 2408 (1992)	40
<i>Nixon v. United States</i> , 113 S. Ct. 732 (1993)	10, 15
<i>Norman v. Reed</i> , 112 S. Ct. 698 (1992)	37
<i>Oregon v. Mitchell</i> , 400 U.S. 112 (1970)	34, 38
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969)	passim
<i>Public Citizen, Inc. v. Miller</i> , 813 F. Supp. 821 (N.D. Ga.), aff'd mem., 992 F.2d 1548 (11th Cir. 1993)	11, 31

TABLE OF AUTHORITIES—Continued

	Page
<i>Rosario v. Rockefeller</i> , 410 U.S. 752 (1973)	36, 37
<i>Signorelli v. Evans</i> , 637 F.2d 853 (2d Cir. 1980)	11, 40
<i>Smiley v. Holm</i> , 285 U.S. 355 (1932)	33
<i>Stack v. Adams</i> , 315 F. Supp. 1295 (N.D. Fla. 1970)	11, 27
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	10, 28, 30, 35, 36
<i>Tashjian v. Republican Party of Connecticut</i> , 479 U.S. 208 (1986)	36, 37
<i>Thorsted v. Gregoire</i> , 841 F. Supp. 1068 (W.D. Wash. 1994)	11, 26, 29, 38
<i>United States v. Darby</i> , 312 U.S. 100 (1941)	40
<i>United States v. Richmond</i> , 550 F. Supp. 605 (E.D.N.Y. 1982)	23
<i>Wesberry v. Sanders</i> , 376 U.S. 1 (1964)	28
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968)	37
STATE CASES	
<i>Advisory Opinion to the Attorney General</i> , 592 So. 2d 225 (Fla. 1991)	26
<i>Application of Ferguson</i> , 294 N.Y.S.2d 174 (N.Y. Sup. Ct.), <i>aff'd</i> , 294 N.Y.S.2d 989 (N.Y. App. Div. 1968)	23
<i>Buckingham v. State ex rel. Killoran</i> , 35 A.2d 903 (Del. 1944)	27
<i>Cobb v. State</i> , 722 P.2d 1032 (Haw. 1986)	27
<i>Danielson v. Fitzsimmons</i> , 44 N.W.2d 484 (Minn. 1950)	23
<i>Ekwall v. Stadelman</i> , 30 P.2d 1037 (Or. 1934)	27
<i>Hellmann v. Collier</i> , 141 A.2d 908 (Md. 1958)	20
<i>In re O'Connor</i> , 17 N.Y.S.2d 758 (N.Y. Sup. Ct. 1940)	23, 27
<i>In re Opinion of the Judges</i> , 116 N.W.2d 233 (S.D. 1962)	27
<i>Lowe v. Fowler</i> , 240 S.E.2d 70 (Ga. 1977)	27
<i>Richardson v. Hare</i> , 160 N.W.2d 883 (Mich. 1968)	27
<i>Riley v. Cordell</i> , 194 P.2d 857 (Okla. 1948)	27
<i>Shub v. Simpson</i> , 76 A.2d 332 (Md.), <i>appeal dismissed</i> , 340 U.S. 881 (1950)	27
<i>State ex rel. Chandler v. Howell</i> , 175 P. 569 (Wash. 1918)	27

TABLE OF AUTHORITIES—Continued

	Page
<i>State ex rel. Chavez v. Evans</i> , 446 P.2d 445 (N.M. 1968)	20
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<i>State ex rel. Handley v. Superior Court</i> , 151 N.E.2d 508 (Ind. 1958)	27
<i>State ex rel. Johnson v. Crane</i> , 197 P.2d 864 (Wyo. 1948)	22, 27
<i>State ex rel. Pickrell v. Senner</i> , 375 P.2d 728 (Ariz. 1962)	27
<i>State ex rel. Santini v. Swackhamer</i> , 521 P.2d 568 (Nev. 1974)	27
<i>State ex rel. Wettengel v. Zimmerman</i> , 24 N.W.2d 504 (Wis. 1946)	27
<i>Stockton v. McFarland</i> , 106 P.2d 328 (Ariz. 1940)	27
<i>Strong v. Breauz</i> , 612 So. 2d 111 (La. Ct. App.), <i>cert. denied</i> , 604 So. 2d 584 (La. 1992)	20
<i>Stumpf v. Lau</i> , 839 P.2d 120 (Nev. 1992)	11, 26
<i>U.S. Term Limits, Inc. v. Hill</i> , 872 S.W.2d 349 (Ark. 1994)	11
FEDERAL CONSTITUTION AND STATUTES	
U.S. Constitution, Article I, § 2, cl. 1	2, 6, 16
Article I, § 2, cl. 2	2, 10
Article I, § 2, cl. 4	2
Article I, § 3, cl. 1	2
Article I, § 3, cl. 6	10
Article I, § 3, cl. 7	24
Article I, § 4, cl. 1	<i>passim</i>
Article I, § 5, cl. 1	2, 7, 10
Article I, § 5, cl. 2	2
Article I, § 6, cl. 2	24
Article VI, cl. 3	23, 24
Amendment X	38, 40
Amendment XIV	22, 24
Amendment XVII	2, 6
Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 67	23
Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 117	23
Act of May 8, 1792, ch. 37, § 12, 1 Stat. 281	23
Act of July 16, 1862, ch. 180, 12 Stat. 577	23
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TABLE OF AUTHORITIES—Continued

STATE CONSTITUTIONS AND STATUTES	Page
Ala. Const. Art. 5, § 11 (1819)	20
Conn. Res. of Oct. 9, 1788.....	19
Del. Const. Art. 3, § 8 (1792)	20
Mich. Const. Art. 4, § 18 (1850)	20
Minn. Const. Art. 6, § 11 (1857)	20
N.J. Act of Nov. 21, 1788, ch. 341, § 3	19
Pa. Const. ch. II, § 11 (1776)	18
Pa. Const. Art. 1, § 18 (1790)	20
S.C. Const. Art. 1, § 21 (1790)	20
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Va. Act of Nov. 20, 1788, ch. 2, § 2	19
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 BOOKS	
1 ANNALS OF CONGRESS (1789)	18
17 ANNALS OF CONGRESS (1807)	9, 21
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THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987)	21
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TABLE OF AUTHORITIES—Continued

	Page
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THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790 (1825)	18
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JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1st ed. 1833)	24, 39
WILLIAM A. SUTHERLAND, NOTES ON THE CONSTITUTION OF THE UNITED STATES (1904)	26
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CHARLES WARREN, THE MAKING OF THE CONSTITUTION (1928)	19, 24, 25
GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969)	17
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TABLE OF AUTHORITIES—Continued

	Page
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Note, <i>The Legal Qualifications of Representatives</i> , 3 AM. L. REV. 410 (1868-69)	22
MISCELLANEOUS	
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1456

U.S. TERM LIMITS, INC., *et al.*,
v. *Petitioners,*

RAY THORNTON, *et al.*,

Respondents.

No. 93-1828

STATE OF ARKANSAS *ex rel.* WINSTON BRYANT,
Attorney General of the State of Arkansas,
v. *Petitioner,*

BOBBIE E. HILL, *et al.*,

Respondents.

On Writ of Certiorari to the
Supreme Court of Arkansas

BRIEF OF RESPONDENTS BOBBIE E. HILL,
ON BEHALF OF THE LEAGUE OF WOMEN VOTERS
OF ARKANSAS, AND DICK HERGET

CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED

Pertinent portions of the Arkansas Term Limitation Amendment, Amendment 73 to the Constitution of Arkansas, and of the United States Constitution are set forth in the Appendix to this Brief.

STATEMENT

The Constitution deals comprehensively with elections to Congress. With respect to the House of Representatives, it provides that: (1) "Members [shall be] chosen every second Year" (Art. I, § 2, cl. 1); (2) the choice shall be made "by the People of the several States" (*id.*); (3) Members must meet three specified qualifications (*id.*, cl. 2); (4) a vacancy is to be filled by the "Executive Authority" of the state (*id.*, cl. 4); (5) the states shall prescribe the "Times, Places and Manner" of holding elections, but Congress may at any time "make or alter" such regulations (*id.*, § 4, cl. 1); (6) the House shall be the "Judge of the Elections, Returns and Qualifications of its own Members" (*id.*, § 5, cl. 1); and (7) the House may "with the Concurrence of two thirds, expel a Member" (*id.*, § 5, cl. 2). Similar provisions govern elections to the Senate.¹

This case concerns the constitutionality of Section 3 of an initiative styled the "Arkansas Term Limitation Amendment" to the Arkansas Constitution (the "Arkansas Measure"), which was adopted in November 1992. The Preamble to the Arkansas Measure declares that "elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people" and that "entrenched incumbency . . . has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers." The Preamble then describes the Measure as follows: "Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of elected officials." See App. 1a *infra*.

The Arkansas Measure provides that any person elected from Arkansas to three or more terms in the U.S. House

¹ Art. I, § 3 provided that the Senators from each state would be "chosen by the Legislature thereof," but the Seventeenth Amendment now provides that the Senators from each state shall be "elected by the people thereof"

of Representatives, or two or more terms in the Senate, "shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the [Chamber in which he or she served]." The terms need not be consecutive, and the bar is for life.

Respondent Bobbie E. Hill, an Arkansas voter and past president of the League of Women Voters of Arkansas (the "League"), individually and on behalf of the League, and respondent Dick Herget, an Arkansas voter, individually and on behalf of others similarly situated, brought this case in the Circuit Court of Pulaski County, Arkansas. They alleged that the Arkansas Measure is an invalid attempt to add to the qualifications set forth in the Constitution for service in Congress and that it also violates the First and Fourteenth Amendments. The circuit court (Piazza, J.) rejected the First and Fourteenth Amendment claim, *see* No. 93-1456 Pet. App. 60a,² but held that "the initiative pertaining to federally elected officials is unconstitutional by virtue of the qualifications clause of the United States constitution and the doctrine of federal supremacy." *Id.* 52a. The court explained that limited prior service "is as much a qualification as wealth, position or poverty. This is a power given by the whole body politic to the Constitution which cannot be usurped by individual actions of the several states." *Id.* 49a.

The Arkansas Supreme Court affirmed. The plurality opinion by Justice Robert L. Brown for three justices

² The court rejected a claim that other portions of the Measure, setting term limits for *state* offices, violated the right of association protected by the First and Fourteenth Amendments, explaining that "the people of this State have the power to limit the terms of the state legislature and executive branch." No. 93-1456 Pet. App. 49a-50a. The court did not explain its rejection of the First and Fourteenth Amendment claim as applied to the exclusion from the ballot of qualified candidates for federal office.

The court also held that the Arkansas initiative was invalid in its entirety under Arkansas law for lack of an "Enacting Clause." No. 93-1456 Pet. App. 47a, 54a-60a. This ruling was subsequently reversed by the Supreme Court of Arkansas. *Id.* 9a-11a.

concluded that “[q]ualifications set out in the U.S. Constitution [are] unalterable except by amendment to that document” (*id.* 14a); it rejected “[t]his effort to dress eligibility to stand for Congress in ballot access clothing” on the ground that “[t]he intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service.” *Id.* 14a-15a. Justices Gerald P. Brown and Dudley concurred in separate opinions. Justices Hays and Cracraft dissented, the former on the ground that the constitutional qualifications are only “minimum qualifications,” *id.* 35a, and the latter on the ground that “the Qualifications Clauses protect only the right of a person . . . to be seated in the Congress if elected. They do not address the right of any person to seek election or that of his constituents to vote for the person of their choice.” *Id.* 38a-39a.

SUMMARY OF ARGUMENT

The Constitution provides a clear and sensible framework for the election “by the people” of persons to serve in Congress. It sets forth express lists of qualifications for service in each House and makes each House the final judge of its members’ qualifications. By clearly evidenced and long-accepted implication, it bars both Congress and the states from adding qualifications. It gives the states the power, under the Times, Places and Manner Clause, to regulate the election process, and it adds that “the Congress may at any time by Law make or alter such Regulations.” Under that Clause, the states and Congress have broad power to assure fair and orderly elections, but neither has the power to bar or hobble qualified candidates who are disfavored for reasons unrelated to the election process. To the best of our knowledge, every decision of every court since the founding of the Nation is consistent with this framework.

In their zeal to keep persons with extensive prior service out of future Congresses without following the prescribed procedures for amending the Constitution, petitioners and other advocates of term limits urge two funda-

mentally new interpretations, each of which would open the congressional qualification process to a wide range of future tampering by both the states and Congress.³

First, petitioners argue that the states may add qualifications to those set forth in the Constitution. But this argument is contrary to the Court’s decision in *Powell v. McCormack*, 395 U.S. 486 (1969), which rested on the Court’s conclusion, after extensive analysis, that the qualifications are “fixed in the Constitution.” 395 U.S. at 540. The *Powell* conclusion is equally applicable to the states: petitioners’ argument that the qualifications are fixed as against Congress but somehow open to supplementation by the states defies the constitutional text, logic, and a lot of history. If the Court were to reconsider *Powell*, it would find that the English background, the debates at the Constitutional Convention, the ratification debates, and subsequent congressional, scholarly and judicial analysis together demonstrate overwhelmingly that the Founder generation understood that the Constitution bars state attempts to add qualifications.

Second, petitioners argue that the Arkansas Measure is not a qualification but a permissible state regulation of the “Times, Places and Manner” of elections under Art. I, § 4, because the Measure leaves what the Arkansas court described as “faint glimmers of opportunity”—the ability to run a write-in campaign. Pet. App. 15a. But however it is labeled, the Measure is an express attempt to exclude persons from Congress because they lack the qualification of limited prior experience. A state has no power (under Art. I, § 4 or otherwise) to regulate the manner of elections so as to hinder candidates who *are* qualified, merely because the state believes they possess

³ We will refer to the briefs of petitioners and their amici as follows: State of Arkansas (State Br.); US Term Limits et al. (USTL Br.); Republican Party of Arkansas et al. (RPA Br.); Dickey and Hutchinson (DH Br.); Washington Legal Foundation et al. (WLF Br.); Citizens United Foundation et al. (CUF Br.); State of Nebraska et al. (Neb. Br.).

personal characteristics that render their service undesirable.

ARGUMENT

The Constitution bars the states (and Congress) from adding to the qualifications for service in Congress. The Arkansas Measure is an invalid attempt to add the qualification of limited prior experience: its stated purpose is to limit the terms of Senators and Representatives to specified lifetime allowances. If, instead, the Measure is viewed as an attempt to regulate "ballot access," it is nevertheless invalid, because a state has no power to exclude from the ballot a congressional candidate who is qualified, and who has complied with all election-related requirements for listing on the ballot, in order to make it harder or impossible for that candidate to win.

I. THE CONSTITUTION BARS STATES (AND CONGRESS) FROM ADDING TO THE QUALIFICATIONS FOR SERVICE IN CONGRESS

The Constitution provides that Representatives shall be "chosen every second Year by the People"⁴ and Senators shall be "elected by the people."⁵ It lists qualifications for each office, and it bars both Congress and the states from adding new qualifications because, in Hamilton's words, "the people should choose whom they please to govern them."⁶ A state might assert plausible policy reasons for disqualifying any person who was not born in the state, or has not served in the state legislature, or has exhausted an allowed period of service, but the Constitution forbids it from imposing any such qualification.

⁴ U.S. Const. Art. I, § 2, cl. 1.

⁵ U.S. Const. Amend. XVII.

⁶ 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 257 (Jonathan Elliot 2d ed., 1836) [hereinafter "Elliot's Debates"], quoted in *Powell v. McCormack*, 395 U.S. 486, 547 (1969).

A. *Powell v. McCormack* Decided That the Qualifications Set Forth in the Constitution Are Exclusive

This Court has already decided the central question in this case. In *Powell v. McCormack*, 395 U.S. 486 (1969), the Court considered whether the House of Representatives could exclude a Member because of personal misconduct. The Court held:

[T]he House [is] without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution.

395 U.S. at 522 (emphasis deleted). That holding was squarely based on what the Court called "the Framers' understanding that the qualifications for members of Congress had been fixed in the Constitution." *Id.* at 540.

Petitioners argue that *Powell* either (i) interpreted only the power of Congress and not that of the states or (ii) interpreted only the power of each House under Art. I, § 5 as "the Judge of the . . . Qualifications of its own Members" and has no bearing on the power of the states or Congress to add qualifications. These arguments are, first of all, illogical. (i) Like other lists, the constitutional qualifications might grammatically have either a "closed" meaning (precluding additions) or an "open" meaning (allowing additions), but nothing in the constitutional text suggests that they might have different meanings depending on which body is seeking to add to them. (ii) If each House is "the Judge" of its members' qualifications but is confined to those "expressly prescribed in the Constitution," 395 U.S. at 522, then a House could not judge any qualification Congress or a state might add—but permitting addition of a qualification of which a House is *not* "the Judge" would flatly contradict the constitutional text.

Petitioners' arguments are also inconsistent with what *Powell* said. The *Powell* Court's exhaustive analysis focused on whether the constitutional lists were closed or open-ended, and its decision rested on the conclusion that

they were closed. The Court began with, and relied heavily on, the Wilkes episode and its apparent impact on the Constitutional Convention. The Court noted that the episode had established in England that

the law of the land had regulated the qualifications of members to serve in Parliament, and that the freeholders . . . had an indisputable right to return whom they thought proper, provided he was not disqualified by any of those known laws . . . [which are] not occasional but fixed.

Id. at 534 n.65. The Court then said that Madison made a "striking[ly]" similar argument to the Convention on August 10, 1787, which thereupon "fac[ed] and then reject[ed] the possibility that the legislature would have power to usurp the 'indisputable right of the people to return whom they thought proper.'" *Id.* at 535. The point of the Court's recital was that the Convention had been persuaded that congressional qualifications should be established in "the law of the land" and "fixed."

The Court also relied heavily on Hamilton's view of "the immutability of the qualifications set forth in the Constitution," 395 U.S. at 540, and noted that "Madison had expressed similar views in an earlier essay [*The Federalist* No. 52], and his arguments at the Convention leave no doubt about his agreement with Hamilton on this issue." *Id.* Again, the Court's point, on which the *Powell* decision was based, was that the Founders viewed the Constitutional qualifications as immutable.⁷

The *Powell* Court also relied, 395 U.S. at 542-43, on the 1807 determination by a House Committee of Elections that Rep. William McCreery should be seated, notwithstanding his failure to satisfy a state-added require-

⁷ The Court gave no hint that it thought the qualifications could somehow be "immutable" vis-a-vis Congress but not vis-a-vis the states, and any such suggestion would have run counter to the very evidence the Court was citing. *The Federalist* No. 52 (Jacob E. Cooke ed., 1961), discussed at pages 15-16 *infra*, clearly expresses Madison's view that the "regulation" of qualifications by the Constitution itself protected the national government against state tampering.

ment of residence within his congressional district, because the qualifications for service are determined in the Constitution "without reserving any authority to the State Legislatures to change, add to, or diminish those qualifications." ⁸ The Court quoted the Committee's chairman, who explained that "neither the State nor the Federal Legislatures are vested with authority to add to [the Constitution's] . . . qualifications, so as to change them." ⁹ The point of the Court's recital (and the only possible relevance of the McCreery episode) was to demonstrate the historic understanding that the Constitution precludes the addition of qualifications by states and *therefore* by Congress; that is what the Court thought it was deciding in *Powell*.¹⁰

Finally, the *Powell* Court relied on the "fundamental principle of our representative democracy . . . in Hamilton's words, 'that the people should choose whom they please to govern them.'" 395 U.S. at 547. That principle is the same whether Congress or a state seeks to restrict the people's choice. It would be violated by a state limitation of candidacy to short-termers, or lifetime residents of the state, or college graduates, or persons with state legislative experience—any of which would presumably be permissible if states could add qualifications. The Court's reliance on that principle in *Powell* is further evidence that what the Court itself thought it was deciding

⁸ *Powell*, 395 U.S. at 542 (quoting 17 *Annals of Cong.* 871 (1807)).

⁹ *Id.* at 543 (quoting 17 *Annals of Cong.* 872).

¹⁰ The Court referred, at one point in its discussion of McCreery, to the "more narrow issue of the power of the States to add to the standing qualifications" *Id.* at 543. The Court may have meant that it would be *easier* to reject a state attempt to add a qualification, because states do not have the power possessed by each House to judge qualifications.

Petitioners argue (*e.g.*, State Br. 47) that the McCreery episode is less convincing evidence than the *Powell* Court took it to be. But the Court's use of the episode shows that it meant to rest its decision in *Powell* on the fact that the qualifications are "fixed in the Constitution."

in *Powell* was that the qualifications for Congress are contained in "the law of the land." 395 U.S. at 534 n.65.

Two terms ago, in *Nixon v. United States*, 113 S. Ct. 732, 739-40 (1993), the Court interpreted its *Powell* ruling, answering the precise question presented here. The Court said, 113 S. Ct. at 740, "Our conclusion in *Powell* was based on the fixed meaning of '[q]ualifications' set forth in Art. I, § 2"—the Qualifications Clause for the House—not, as petitioners here contend, Art. I, § 5, which gives the House the power to judge qualifications. The point was important: the petitioner in *Nixon* was arguing that a ruling that the Senate had unreviewable discretion to choose impeachment procedures (under Art. I, § 3, cl. 6) would be inconsistent with *Powell*'s determination that the House did *not* have unreviewable discretion (under Art. I, § 5) to judge Members' qualifications. The Court responded that *Powell* did not rest on Art. I, § 5, but rather on "the existence of this separate provision [Art. I, § 2] specifying the only qualifications which might be imposed for House membership." *Id.*¹¹

In sum, the Constitution sets forth a list of qualifications for service in the House, and this Court determined in *Powell*, after an extensive review of the historical record, that the Founders meant that list to be exclusive. The force and consequences of that interpretation of the constitutional text do not depend on whether it is Con-

¹¹ Other decisions of this Court are consistent with our reading of *Powell* and with *Powell*'s continuing validity. A year after *Powell*, Justice Black, sitting as Circuit Justice in *Davis v. Adams*, 400 U.S. 1203, 1204 (1970), said that Florida had "exceeded its constitutional powers" by adding to "the qualifications established by federal law for candidates for federal office." *Storer v. Brown*, 415 U.S. 724 (1974), held only that certain regulations of the election process did not constitute qualifications for service and therefore did not raise a *Powell* issue. (*Storer* is further discussed at pages 30-31 and 35-36 below.) And *Buckley v. Valeo*, 424 U.S. 1, 133 (1976), held only that the power of Congress under Art. I, § 5 to judge qualifications did not give it the power to create a federal agency whose structure violated the Appointments Clause; qualifications for service in Congress were not at issue.

gress or a state that is seeking to add to the exclusive list.¹²

B. The *Powell* Court's Interpretation of the Constitution Was Correct

If the Court were now to reconsider *Powell*, it would be forced to the same conclusion. Together, the English context, the Convention proceedings, the ratification debates, congressional, judicial and scholarly views, and the fundamental principle on which the Founders were acting demonstrate overwhelmingly that a state may not add qualifications.

1. The Founders Believed That the Constitutional Qualifications Are Exclusive and Unalterable by the States

The Convention. To begin with, it is undisputed that the Founders considered and rejected inserting congressional term limits in the Constitution itself. The "Virginia Plan" would have made Representatives ineligible for reelection for a number of years after their terms and the President permanently ineligible.¹³ On June 12, 1787, however, the Convention voted unanimously to remove congressional term limits from the Virginia Plan,¹⁴ and later the presidential term limit was removed as well.¹⁵

¹² 395 U.S. at 543. Many courts, including the court below, have noted that *Powell* necessarily means that the states are also barred from adding to the qualifications stated in the Constitution. *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 356 (Ark. 1994); see also *Stumpf v. Lau*, 839 P.2d 120, 122-23 (Nev. 1992); *Joyner v. Mofford*, 706 F.2d 1523, 1528-30 (9th Cir.), cert. denied, 464 U.S. 1002 (1983); *Signorelli v. Evans*, 637 F.2d 853, 858 (2d Cir. 1980); *Thorsted v. Gregoire*, 841 F. Supp. 1068, 1077 (W.D. Wash. 1994); *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821, 831 (N.D. Ga.), aff'd mem., 992 F.2d 1548 (11th Cir. 1993); *Stack v. Adams*, 315 F. Supp. 1295, 1297-98 (N.D. Fla. 1970).

¹³ 1 *The Records of the Federal Convention of 1787*, at 20-21 (Max Farrand rev. ed., 1974) [hereinafter "Farrand"].

¹⁴ 2 Farrand 217.

¹⁵ See *id.* at 497-502, 522-28.

It is clear beyond a reasonable doubt that the Founders believed that the qualifications that *were* set forth in the Constitution would be exclusive. As noted above, the background was set by the Wilkes episode, which "had a significant impact in the American colonies," and which determined that qualifications were regulated by "the law of the land" and were "not occasional but fixed."¹⁶ Against this background, on August 10, 1787, the Convention debated (i) the Committee of Detail's proposal that the Constitution should give Congress the authority to establish property qualifications for service in Congress and (ii) Gouverneur Morris' proposal to grant the same authority without limiting it to property, so as "to leave the Legislature entirely at large." Both proposals were defeated.¹⁷

Two points about this debate are clear. First, the extended discussion of these proposed grants of authority made no sense, from any point of view, unless the common assumption was that without such grants the qualifications set forth in the Constitution were exclusive. Second, Madison argued to the Convention in terms this Court called "striking[ly]" parallel to the arguments made for Wilkes,¹⁸ and he prevailed. According to Madison, "The qualifications of electors and elected were funda-

¹⁶ *Powell*, 395 U.S. at 530; *id.* at 528, quoting 16 Parl. Hist. Eng. 589, 590 (1769). The Court elsewhere described the issue as "Could the Commons put in any disqualification, that is not put in by the law of the land." 395 U.S. at 528 n.54 (quotation marks and citation omitted).

¹⁷ 2 *Farrand* 249-51; see *Powell*, 395 U.S. at 535.

¹⁸ *Powell*, 395 U.S. at 534. Madison appears to have alluded to the Wilkes episode, stating that "the British Parliamt. possessed the power of regulating the qualifications both of the electors, and the elected; and the abuse they had made of it was a lesson worthy of our attention." 2 *Farrand* 250; see also *Powell*, 395 U.S. at 535 & n.68. As the *Powell* Court noted, *id.*, Madison may also have been referring to the Parliamentary Test Act bar to Catholics serving in Parliament; the Court's suggestion is further evidence that *Powell* was concerned with legislative bans against classes of persons, not just with a legislature's power to judge qualifications.

mental articles in a Republican Govt. and ought to be fixed by the Constitution." ¹⁹ As the Court said in *Powell*, 395 U.S. at 535-36, the Framers faced and rejected the suggestion that the constitutional qualifications be open to later additions.

Petitioners contend (*e.g.*, USTL Br. 40-41) that Madison (and by inference the Convention) was opposed only to Congress having the power to set qualifications. But, first, this argument is unsupported by Madison's text; his concern about the possibility of partisan manipulation applies equally to qualifications imposed by states or Congress, and *The Federalist* No. 52 makes clear that Madison's fear on this point extended to the states.²⁰ Second, if the Convention meant, "The listed qualifications may not be supplemented by Congress, but may be supplemented by the States," it utterly failed to say so; nothing in the constitutional text will bear such a reading. Third, there is no evidence whatsoever, in the Convention debates or the ratification debates, that anyone thought the states would have the power to add qualifications.²¹

¹⁹ 2 *Farrand* 249-50. Madison further argued that unless they were fixed in the Constitution, "[q]ualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partizans of [a weaker] faction." *Id.* Hugh Williamson of North Carolina agreed with Madison, arguing that if the qualifications were not fixed in the Constitution and if a majority of some future Congress were lawyers, they could require that only lawyers could become members of Congress. *Id.* at 250.

²⁰ See pages 15-16 *infra*.

²¹ The State of Arkansas (Br. 41-42 n.43) notes that James Wilson opposed granting Congress the power to establish property qualifications because granting "this particular power would constructively exclude every other power of regulating qualifications." 2 *Farrand* 251. But (i) Wilson's theory of interpretation supports our view that the constitutional listing of some qualifications bars the "occasional" addition of others, and (ii) as noted in the text, the entire debate about granting Congress this power makes no sense on the State's view. John Dickinson, a Convention delegate from Delaware, also articulated an "expressio unius" theory of interpretation. *Id.* at 123 (stating that a "partial" list of qualifi-

Petitioners also contend (e.g., State Br. 41) that the following passage in Edmund Randolph's notes, which they assert reflect proceedings in the Committee of Detail, supports their position:

The qualifications of (a) delegates shall be the age of twenty five years at least: and citizenship: (and any person possessing these qualifications may be elected except).²²

Their argument is that the absence of the words in the last parenthesis from the final text of the Constitution reflects a decision to allow later additions to the constitutional qualifications. But there is no conclusive evidence (i) that the Randolph passage reflects a proposed text considered by the Committee, or (ii) that the Committee advertently deleted the parenthetical words, or (iii) if so, whether the words were deleted as incorrect or superfluous.²³

The Republican Party of Arkansas (Br. 5-6) also seeks to resurrect an argument based on the Committee of Style's decision to word the Qualifications Clauses negatively instead of positively. The *Powell* Court rejected precisely this argument, noting, *inter alia*, that this com-

cations "would by implication tie up the hands of the Legislature from supplying the omissions").

²² 4 *Farrand* 39 (emphasis omitted, footnote omitted); see also 2 *Farrand* 139.

²³ One possible explanation for the deletion is that the Committee had been charged to draft a property qualification, see 2 *Farrand* 124-25, but could not agree on such a qualification, see *id.* at 249 (statement of Mr. Rutledge). The Committee proposed instead to empower Congress to deal with the matter, which meant it had to delete the parenthetical language. This explanation is supported by the fact that Randolph made and later crossed out the following marginal note at the precise point where the language at issue appears: "qu: if a certain term of residence and a certain quantity of landed property ought not to be made by the convention further qualifications." See 4 *Farrand* 39 n.7; see also 2 *Farrand* 139 n.7. The Committee's proposal to give Congress the power to establish property qualifications was, as we have noted, later defeated.

mittee was not empowered to make substantive changes to the Constitution. 395 U.S. at 537-39 & n.73; accord *Nixon*, 113 S. Ct. at 737.

Ratification. Events during ratification further confirm that the general understanding was that the constitutional qualifications were exclusive. To begin with, Madison could hardly have been clearer:

The qualifications of the elected being less carefully and properly defined by the State Constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the Convention. [Madison describes the express qualifications.] Under these reasonable limitations, the door of this part of the Federal Government, is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession or religious faith.

The Federalist No. 52, at 354 (Jacob E. Cooke ed., 1961).²⁴ Hamilton agreed with Madison, noting in *The Federalist* No. 60 that the "qualifications of the persons who may choose or be chosen . . . are defined and fixed in the Constitution and unalterable by the legislature."²⁵

The State argues (Br. 45-46 n.48) that Madison's statement in *The Federalist* No. 52 is "best seen as ad-

²⁴ Madison noted in *The Federalist* No. 53, at 365, that some members of Congress "will by frequent re-elections, become members of long-standing" and because they "will be thoroughly masters of the public business" would be less likely than inexperienced members "to fall into the snares that may be laid for them." Hamilton expressed specific opposition to congressional term limits during the ratification debates. See 2 *Elliot's Debates* 320; cf. *The Federalist* No. 72 (Hamilton's argument against presidential term limits).

²⁵ *The Federalist* No. 60, at 409. The State argues (Br. 45) that the qualifications of "electors" were not in fact fixed, and suggests that Hamilton's views about the qualifications of the "elected" are therefore not to be trusted. But the premise is wrong. Both Hamilton and Madison believed that the Constitution had "fixed"

dressed to Congress." But, first, there is no evidence that Madison thought the constitutional lists could have a preclusive meaning in one context and an open meaning in another. Second, the context and language of the passage make it clear that Madison was in fact addressing state-added qualifications. He had just finished saying, with respect to *voter* qualifications, that there had been concern about "render[ing] too dependent on the state governments that branch of the federal government which ought to be dependent on the people alone [i.e., the House]" but that the Convention was forced by the diversity of existing state arrangements to adopt the "most numerous Branch" compromise of Art. I, § 2. Madison then immediately contrasted *member* qualifications, which "being . . . more susceptible of uniformity, have been very properly considered and regulated by the convention." The reference to "uniformity" and Madison's whole train of thought make no sense if the passage is viewed as "addressed to Congress." Finally, Madison's statement that "under these reasonable limitations, the door . . . is open to merit of every description" would of course be false if states could add qualifications.²⁶

the qualifications of House "electors" (albeit not uniformly), by tying these qualifications to the qualifications for electors of the "most numerous Branch" of the state legislature (see Art. I, § 2), which according to Madison were "fixed by the State constitutions" and unlikely to be changed. Madison explains the point at length in *The Federalist* No. 52.

²⁶ Madison repeated his theme in *The Federalist* No. 57, writing: Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.

The Federalist No. 57, at 385. *The Federalist* No. 52 also demonstrates that USTL's argument (Br. 36) based on the power of the states to define citizenship and inhabitancy is a non sequitur. The states were not free to define these terms in some special way for purposes of Art. I, §§ 2-3. As Madison makes clear, the Convention well understood how to leverage the fact that states would be tied to their own general definitions.

Petitioners simply ignore the significance of the controversy, during the ratification debates, over the Founders' decision not to impose term limits in the Constitution itself. Opponents of ratification complained that, without term limits, Congress and the President would become an aristocracy.²⁷ Their argument was explicitly based on the understanding that under the Constitution the states would not be able to impose term limits on their representatives in Congress.²⁸ No proponent of ratification attempted to blunt this criticism by arguing that states could set term limits or other added qualifications; instead, Federalists responded that term limits would abridge the "natural right" of the people by depriving them of the freedom to select the representatives they preferred.²⁹ In

²⁷ Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 520-22 (1969); Erik H. Corwin, Recent Development, *Limits on Legislative Terms: Legal and Policy Implications*, 28 Harv. J. on Legis. 569, 582-87 (1991); see also *The Complete Anti-Federalist* § 2.8.147 (Herbert J. Storing ed., 1981) (letter of "The Federal Farmer" in support of term limits); *id.* § 2.9.201 (essay of "Brutus" in support of term limits). Elbridge Gerry, who attended the Convention, declined to sign the Constitution and became a leading Anti-Federalist in part because of "the duration and reeligibility of the Senate" and the failure to impose a term limit on the President. Troy A. Eid & Jim Kolbe, *The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office*, 69 Denv. U. L. Rev. 1, 14-15 & n.71 (1992) (quoting *Anti-Federalists Versus Federalists: Selected Documents* 1-2 (John D. Lewis ed., 1967)).

²⁸ See *The Complete Anti-Federalist*, *supra* n.27, § 3.11.48 (Dissent of the Minority of the Convention of Pennsylvania, Dec. 18, 1787) ("For the moderate exercise of this power, there is no controul left in the state governments, whose intervention is destroyed"); *id.* § 3.8.3 (Letter by an Officer of the Late Continental Army, Nov. 3, 1787) ("Rotation, that noble prerogative of liberty, is entirely excluded from the new system of government") (emphasis added).

²⁹ John Adams defended the Constitution's omission of term limits, in his 1787 *Defence of the Constitutions of Government of the United States of America*, using language that plainly assumes preclusion of both congressional and state attempts to add them:

rotation . . . is a violation of the rights of mankind; it is an abridgement of the rights both of electors and candidates. There is no right clearer, and few of more importance, than

sum, both sides understood that the Constitution as written barred states from imposing term limits; no one on either side suggested that the Constitution permitted states to impose term limits.³⁰

Early State Actions. Contrary to petitioners' arguments, the behavior of the states in the ratification and post-ratification periods generally confirms their understanding that the Constitution barred state-imposed additional qualifications, including term limits. In 1790, Pennsylvania removed the state constitutional provision that had limited the terms of its representatives in the Confederation Congress, and would have limited terms of service in Congress, apparently because the provision was inconsistent with the new Constitution.³¹ Not a single state

that the people should be at liberty to choose the ablest and best men, and that men of the greatest merit should exercise the most important employments[.]

6 *Works of John Adams* 52-53 (Charles F. Adams ed., 1851). Robert Livingstone made a similar argument in his Address to the New York Ratification Convention, see 2 *Elliot's Debates* 292-93.

³⁰ To the contrary, proponents of term limits sought unsuccessfully to change the text of the Constitution. The Virginia and North Carolina ratifying conventions proposed that the Constitution be altered to provide that members of Congress "should, at fixed periods, be reduced to a private station." 3 *Elliot's Debates* 657-58 (Virginia); 4 *Elliot's Debates* 243 (North Carolina). New York proposed that the Constitution be amended to prevent Senators from serving "more than six years in any term of twelve years." 1 *Elliot's Debates* 330. The First Congress considered and rejected a constitutional amendment limiting representatives to three terms during any eight-year period. See 1 *Annals of Cong.* 790 (1789).

³¹ On March 24, 1789, the Pennsylvania General Assembly passed a resolution calling for an immediate constitutional convention to revise the state's 1776 constitution, which provided that "no man shall sit in congress longer than two years successively, nor be capable of re-election for three years afterwards." Pa. Const. of 1776, ch. II, § 11. According to the resolution, immediate action was required because "the burdens and expenses of the present form of government are with difficulty born, and various instances occur wherein this form is contradictory to the constitution of the United States." *The Proceedings Relative to Calling the Conven-*

attempted to impose term limits on its members of Congress, although more than half imposed term limits on some state offices,³² several had imposed restrictions on the terms of their delegates to the Continental Congress,³³ and three had called for term limit amendments to the constitutional text.³⁴

Petitioners stress Virginia's 1788 adoption of a property qualification for members of its congressional delegation.³⁵ But the significant facts are that (i) no other state attempted to impose such a qualification, although virtually all states then imposed property qualifications for state offices,³⁶ and (ii) the Virginia provision was replaced in 1813 by a provision stating that candidates for the House of Representatives need only be "qualified according to the Constitution of the United States,"³⁷ an explicit reference suggesting that Virginia had recognized that the prior law was unconstitutional.

Finally, petitioners assert that there were numerous other early state attempts to impose qualifications, but their examples prove very little. Some citations are to neutral election procedure requirements that do not implicate the present question at all.³⁸ Others are to statutes

tions of 1776 and 1790, at 129 (1825) (emphasis added). The 1790 constitution that emerged from the convention did not include congressional term limits.

³² See Brendan Barnicle, Comment, *Congressional Term Limits: Unconstitutional by Initiative*, 67 Wash. L. Rev. 415, 417 (1992).

³³ See *id.*

³⁴ See n.30 *supra*.

³⁵ See Va. Act of Nov. 20, 1788, ch. 2, § 2.

³⁶ See Charles Warren, *The Making of the Constitution* 416-17 (1928) (listing state property qualifications).

³⁷ Va. Act of Feb. 6, 1813, ch. 23, § 2.

³⁸ See USTL Br. 26, citing N.J. Act of Nov. 21, 1788, ch. 341, § 3 (establishing a preliminary nominating process); Conn. Res. of Oct. 9, 1788 (same).

regulating the qualifications for state office,³⁹ or the conduct of persons who hold state office,⁴⁰ both matters within a state's competence that do not bear on the present question. See pages 38-40 *infra*. A few states imposed requirements of residence in the Member's district (whereas the Constitution requires only residence in the state) or a specified period of residence in the state; these were indeed unconstitutional, as every court to consider them has found.⁴¹ But the mistakes seem natural (the Constitution did not provide for districts at all); and in any event, there is no evidence that any state legislature focused, when it created these requirements, on the fact that it was adding to the constitutional qualifications.

Jefferson. As petitioners note (*e.g.*, USTL Br. 33 n.51), one important member of the Founder generation, Thomas Jefferson, expressed the view in an 1814 letter to Joseph Cabell that a state could vary the constitutional

³⁹ See State Br. App. C, citing, *e.g.*, Ala. Const. Art. 5, § 11 (1819) (no federal officer shall serve as state judge); Del. Const. Art. 3, § 8 (1792) (no member of Congress shall serve as a state judge); Pa. Const. Art. 1, § 18 (1790) (no member of Congress shall serve in state legislature); S.C. Const. Art. 1, § 21 (1790) (no federal officer shall serve in state legislature); Tenn. Const. Art. 5, § 3 (1796) (federal officers not eligible to serve as state supreme court justices).

⁴⁰ See State Br. App. C, citing, *e.g.*, Mich. Const. Art. 4, § 18 (1850) (no member of state legislature may accept appointment as U.S. Senator); Minn. Const. Art. 6, § 11 (1857) (during continuance in state office, state judge may not run for federal office).

⁴¹ See *Dillon v. Fiorina*, 340 F. Supp. 729 (D.N.M. 1972) (two-year residence requirement within state unconstitutional); *Exon v. Tiemann*, 279 F. Supp. 609 (D. Neb. 1968) (three-judge court) (district residency requirement unconstitutional); *State ex rel. Chavez v. Evans*, 446 P.2d 445 (N.M. 1968) (same); *Hellmann v. Collier*, 141 A.2d 908 (Md. 1958) (same); cf. *Strong v. Breauz*, 612 So. 2d 111, 112 (La. Ct. App.) ("[t]he qualifications prescribed by [the Qualifications] clause are exclusive and neither a state constitution nor state law can add to nor take away from such qualifications"), *cert. denied*, 604 So. 2d 584 (1992).

qualifications.⁴² But Jefferson, who was in Paris in 1787 and did not attend the Convention, noted in the same letter that his earlier opinion had been to the contrary and added, "on so recent a change of view, caution requires us not to be too confident, and that we admit this to be one of the doubtful questions[.]"⁴³

2. The Early Congresses Recognized That States Could Not Add Qualifications

The early Congresses read the Constitutional qualifications as exclusive. As the Court noted in *Powell*, the House in 1807 seated William McCreery, notwithstanding his failure to meet an in-district residency requirement imposed by the State of Maryland.⁴⁴ The contemporaneous understanding of the McCreery case was that it "settled that the States have not a right to require qualifications from members different from, or in addition to, those prescribed by the constitution."⁴⁵

As the *Powell* Court also noted,⁴⁶ Congress faithfully adhered to the principle that the constitutional qualifica-

⁴² The letter is reprinted in 2 *The Founders' Constitution* 81 (Philip B. Kurland & Ralph Lerner eds., 1987).

⁴³ *Id.* at 81. USTL also notes (Br. 47) that Judge St. George Tucker approved of Virginia's property ownership requirement for members of Congress as a policy matter; however, Tucker also cautioned that the provision "may be rendered nugatory, by the constitution which imposes no such condition." 1 St. George Tucker, *Blackstone's Commentaries* App. 197 (1803).

⁴⁴ In the course of the McCreery debate, the House rejected by a 92-8 vote a motion offered by John Randolph implying that the Maryland qualification was constitutional. 17 *Annals of Cong.* 871-72 (1807). Petitioners rely (RPA Br. 4-5; USTL Br. 46) on Randolph's remarks in advancing their own interpretation of the McCreery debate, but the vote on Randolph's motion makes it clear that his position was resoundingly rejected by the House as a whole.

⁴⁵ *Cases of Contested Elections* 171 (M. St. Clair Clarke & David A. Hall eds., 1834) (emphasis deleted).

⁴⁶ See *Powell*, 395 U.S. at 542.

tions are exclusive throughout much of the nineteenth century.⁴⁷ In particular, the House in 1856 seated Samuel Marshall, even though he was undisputedly disqualified under an Illinois law providing that state judges were not eligible for other offices "during the term for which they were elected, nor for one year thereafter." By doing so, the House endorsed a Committee on Elections report that stated:

It is a fair presumption that, when the Constitution prescribes the[] qualifications as necessary to a Representative in Congress, it was meant to exclude all others. And to your committee it is equally clear that a State of the Union has not the power to superadd qualifications to those prescribed by the Constitution for Representatives, to take away from "the people of the several States" the right given them by the Constitution to choose, "every second year," as their Representative in Congress, any person who has the required age, citizenship, and residence.

1 *Hinds' Precedents of the House of Representatives* § 415, at 385 (1907). In the same year the Senate voted by a margin of 35 to 8 to seat Lyman Trumbull, who was purportedly disqualified under the same Illinois law.⁴⁸

⁴⁷ The only significant exception is one set of incidents after the Civil War. In 1868, the House and Senate each voted to exclude members-elect for giving aid and comfort to the Confederacy. See *Powell*, 395 U.S. at 544 & n.81. This Court described these actions as taken in "the naked urgency of power" and without doctrinal support, *id.* at 544, but they may also have been influenced by the impending ratification of the Fourteenth Amendment (proposed in 1866 and ratified in 1868), which explicitly disqualifies such persons. U.S. Const. Amend. XIV. Indeed, the adoption of Section 3 of the Fourteenth Amendment suggests that Congress believed that a constitutional amendment was required to disqualify Confederate soldiers and officers from serving in Congress.

⁴⁸ See *State ex rel. Johnson v. Crane*, 197 P.2d 864, 868-69 (Wyo. 1948) (discussing the Trumbull case). See also Note, *The Legal Qualifications of Representatives*, 3 Am. L. Rev. 410 (1868-69) (concluding that it was settled law that a state could not add to or otherwise affect the qualifications of its members of Congress).

Petitioners note that Congress has frequently adopted statutes barring certain classes of persons, such as those convicted of bribery and abuse of public office, from "holding any office under the United States."⁴⁹ Those statutes prove nothing of relevance to this case. Congress, in barring felons from "all federal office," was not obliged to add the words "except Congress" in order to show that it was not seeking to override the Constitution. No state or federal statute can be constitutionally applied to bar otherwise qualified and duly elected persons from service in Congress,⁵⁰ but the adoption of such general statutes does not imply a congressional view on the present question.⁵¹

⁴⁹ See State Br. 43, citing Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 67; Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 117; Act of May 8, 1792, ch. 37, § 12, 1 Stat. 281. In the Civil War period, Congress adopted statutes barring from "any office under the United States" any member of Congress who engaged in specified misconduct. See, e.g., USTL Br. 30, citing Act of July 16, 1862, ch. 180, 12 Stat. 577; Act of June 11, 1864, ch. 119, 13 Stat. 123. Of course, even when a sitting member of Congress is convicted of a crime, he or she may be removed only by an exercise of the congressional expulsion power. *Burton v. United States*, 202 U.S. 344, 369 (1906).

⁵⁰ Every court to consider the question has concluded that felons may not be barred from congressional service. See *Application of Ferguson*, 294 N.Y.S.2d 174 (N.Y. Sup. Ct.), *aff'd*, 294 N.Y.S.2d 989 (N.Y. App. Div. 1968); *Danielson v. Fitzsimmons*, 44 N.W.2d 484 (Minn. 1950); *In re O'Connor*, 17 N.Y.S.2d 758 (N.Y. Sup. Ct. 1940); *State ex rel. Eaton v. Schmahl*, 167 N.W. 481 (Minn. 1918); cf. *United States v. Richmond*, 550 F. Supp. 605 (E.D.N.Y. 1982) (Weinstein, J.) (portion of felony plea agreement purporting to bar defendant from running for Congress unconstitutional); see *id.* at 607 ("The states are barred from imposing additional qualifications on congressional candidates."); see also Joshua Levy, Note, *Can They Throw the Bums Out? The Constitutionality of State-Imposed Congressional Term Limits*, 80 Geo. L.J. 1913, 1933-34 (1992).

⁵¹ Similarly, the Religious Test Clause of Art. VI ("no religious Test shall ever be required as a Qualification to any Office of public trust under the United States") sets forth a broad commitment of the new Nation applicable to all federal officials. As applied to members of Congress it was logically unnecessary, but the Framers

3. *All the Prominent Early Constitutional Scholars and a Large and Unanimous Number of Courts Have Interpreted the Constitution as Barring the States (and Congress) From Adding Qualifications*

Joseph Story's *Commentaries on the Constitution of the United States* (1st ed. 1833), the pre-eminent early secondary source for interpretation of the Constitution, addressed the question "whether the states can superadd any qualifications [for service in Congress] to those prescribed by the constitution of the United States." *Id.* § 624. Story's answer was no:

It would seem but fair reasoning upon the plainest principles of interpretation, that when the constitution established certain qualifications, as necessary for office, it meant to exclude all others, as prerequisites. From the very nature of such a provision, the affirmation of these qualifications would seem to imply the negative of all others.

Id. § 625.⁵³ Other prominent nineteenth century scholars agreed with Story's conclusion. New York's Chancellor

were not required to add the (potentially confusing) words "except Congress" in order to eliminate the redundancy.

The State argues (Br. 37-38) that other provisions in the Constitution—Art. I, § 6, cl. 2 (the Incompatibility Clause); Art. I, § 3, cl. 7 (the Impeachment Clause); Art. VI (the Religious Test Clause); Amend. XIV, § 3 (participation in insurrection)—"show that the Qualifications Clauses do not fix the exclusive prerequisites for Congress." But other requirements set forth, originally or subsequently, in the Constitution itself do not suggest that the Founding generation thought Congress or a state could add further qualifications: the point is that the qualifications set forth in the Constitution are exclusive, not that the Qualifications Clauses themselves contain the exclusive list.

⁵³ Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. 97, 112-14 (1991), argues that modern courts generally place less weight on the "expressio unius" principle. But the issue is whether the Founders would have understood the constitutional lists as open or preclusive. In addition to Story, Charles Warren, *The Making*

James Kent said, "The question [is] whether the individual states can superadd to, or vary the qualifications prescribed to the representative by the constitution of the United States [T]he objections to the existence of any such power appear to me to be too palpable and weighty to admit of any discussion." ⁵⁴ Historian George McCrary, who had been a member of the House of Representatives and Chairman of its Committee on Elections, wrote: "It is not competent for any state to add to or in any manner change the qualifications for federal office, as prescribed by the constitution or laws of the United States." ⁵⁵ And Judge Thomas Cooley observed that "[t]he Constitution and laws of the United States determine what shall be the qualifications for federal offices, and state Constitutions and laws can neither add to nor take away from them." ⁵⁶

Twentieth century commentators overwhelmingly share the view of Story, Kent, McCrary, and Cooley. Charles Warren believed that the qualifications established by the Constitution could be supplemented only by federal constitutional amendment.⁵⁷ Charles Burdick wrote that "[i]t is clearly the intention of the Constitution that all persons not disqualified by the terms of the instrument should be

of the Constitution 421-22 (1928), argues that the Founders would have read the text preclusively.

⁵⁴ 1 James Kent, *Commentaries on American Law* 228 n.b (3d ed. 1836).

⁵⁵ George McCrary, *A Treatise on the American Law of Elections* 164 (1875).

⁵⁶ Thomas Cooley, *The General Principles of Constitutional Law in the United States* 257 (1880). See also George Washington Paschal, *The Constitution of the United States, Defined and Carefully Annotated* 66 (1876) ("The Constitution having fixed the qualifications of members, no additional qualifications can rightfully be required by the States.").

⁵⁷ Warren, *supra* n.52, at 412-26; see *id.* at 422 ("The elimination of all power in Congress to fix qualifications clearly left the provisions of the Constitution itself as the sole source of qualifications").

eligible to the federal office of Representative[.]”⁶⁷ And most of those addressing the issue in recent years have reached the same conclusion.⁶⁸

Finally, every federal and state court that has considered the issue has concluded that states, like Congress, may not add to the qualifications established by the Constitution. Courts have struck down state laws imposing term limits on service in Congress⁶⁹ as well as laws dis-

⁶⁷ Charles Burdick, *The Law of the American Constitution* 160, 165 (1929); see also William A. Sutherland, *Notes on the Constitution of the United States* 40 (1904) (stating that the Qualifications Clause “fixes the qualifications of members so far as state action is concerned, and no additional qualifications can be required by the state”).

⁶⁸ Daniel Hays Lowenstein, *Are Congressional Term Limits Constitutional?*, 18 Harv. J.L. & Pub. Policy 1 (forthcoming Nov. 1994); Johnathan Mansfield, Note, *A Choice Approach to the Constitutionality of Term Limitation Laws*, 78 Cornell L. Rev. 966 (1993); Tiffanie Kovacevich, Note, *Constitutionality of Term Limitations: Can States Limit the Terms of Members of Congress?*, 23 Pac. L.J. 1677 (1992); Troy A. Eid & Jim Kolbe, *The New Anti-Federalism*, 69 Denv. U.L. Rev. 1 (1992); Steven Greenberger, *Democracy and Congressional Tenure*, 41 DePaul L. Rev. 37 (1991); Martin E. Latz, *The Constitutionality of State-Passed Congressional Term Limits*, 25 Akron L. Rev. 155 (1991); Joshua Levy, *Can They Throw the Bums Out?*, 80 Geo. L.J. 1913 (1992); Brendan Barnicle, *Congressional Term Limits*, 67 Wash. L. Rev. 415 (1992); Erik H. Corwin, *Limits on Legislative Terms*, 28 Harv. J. on Legis. 569 (1991); L. Paige Whitaker, *The Constitutionality of States Limiting Congressional Terms* (Congressional Research Service 1992).

⁶⁹ See *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994); *Stumpf v. Lau*, 839 P.2d 120, 123 (Nev. 1992) (term limit law “palpably” violates the qualifications clauses of Article I); see also *Advisory Opinion to the Attorney General*, 592 So. 2d 225, 230-31 (Fla. 1991) (Overton, J. and Kogan, J., dissenting) (majority held that challenge to constitutionality of term limit initiative was not ripe before the initiative was adopted; dissenting justices reached the merits and found that the initiative was plainly unconstitutional under *Powell v. McCormack* and *Davis v. Adams*).

qualifying candidates who (i) failed to meet narrower residency requirements than the Constitution prescribes,⁷⁰ or (ii) had been convicted of felonies,⁷¹ or (iii) were suspected of disloyalty,⁷² or (iv) failed to meet a variety of other tests.⁷³ There have been no contrary decisions.

II. CALLING THE ARKANSAS MEASURE A “MERE BALLOT ACCESS” MEASURE DOES NOT SAVE IT FROM UNCONSTITUTIONALITY

Recognizing the force of the case against state power to add qualifications, proponents of term limits formulated the Arkansas Measure as a bar to appearance on the ballot, and they now defend it in this Court as a mere regulation of the “manner” of elections to Congress. Their arguments fail for two reasons. First, however it may be labeled, the Measure is, on its face, an attempt to exclude certain persons from Congress because they

⁷⁰ See n.41 *supra*.

⁷¹ See n.50 *supra*.

⁷² See, e.g., *Shub v. Simpson*, 76 A.2d 332 (Md.) (anti-subversion declaration requirement unconstitutional), *appeal dismissed*, 340 U.S. 881 (1950); *In re O'Connor*, 17 N.Y.S.2d 758 (N.Y. Sup. Ct. 1940) (disqualification for disloyalty).

⁷³ See, e.g., *Stack v. Adams*, 315 F. Supp. 1295 (N.D. Fla. 1970) (three-judge court); *State ex rel. Pickrell v. Senner*, 375 P.2d 728 (Ariz. 1962); *Stockton v. McFarland*, 106 P.2d 328 (Ariz. 1940); *Buckingham v. State ex rel. Killoran*, 35 A.2d 903, 905 (Del. 1944); *Lowce v. Fowler*, 240 S.E.2d 70 (Ga. 1977); *State ex rel. Handley v. Superior Court*, 151 N.E.2d 508 (Ind. 1958); *Richardson v. Hare*, 160 N.W.2d 883, 887-88 (Mich. 1968); *State ex rel. Santini v. Swackhamer*, 521 P.2d 568 (Nev. 1974); *Riley v. Cordell*, 194 P.2d 857 (Okla. 1948); *Ekwall v. Stadelman*, 30 P.2d 1087 (Or. 1934); *In re Opinion of the Judges*, 116 N.W.2d 233 (S.D. 1962); *State ex rel. Chandler v. Howell*, 175 P. 569 (Wash. 1918); *State ex rel. Wettengel v. Zimmerman*, 24 N.W.2d 504 (Wis. 1946); *State ex rel. Johnson v. Crane*, 197 P.2d 864 (Wyo. 1948); see also *Cobb v. State*, 722 P.2d 1032 (Haw. 1986) (avoiding constitutional issue by interpreting “resign to run” statute not to apply to candidates for federal positions).

lack the qualification of limited prior experience. Second, in any event, a state has no power (under the Times, Places and Manner Clause of Art. I, § 4 or otherwise) to regulate the manner of elections so as to cripple candidates who *are* qualified, merely because the state believes their continued service would be undesirable.⁶⁴

A. The Arkansas Measure Is Invalid Because It Violates the Principle That States May Not Add Qualifications

The Arkansas Measure is, on its face, an attempt to exclude from Arkansas' representatives in Congress any person who has exhausted his or her lifetime allotment of allowed congressional service. Its first sentence is a declaration "that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people." Its preamble then states what the Measure does: "Therefore, the people of Arkansas . . . herein limit the terms of elected officials." App. 1a.⁶⁵

⁶⁴ Some supporters of the Measure argue (e.g., RPA Br. 14-15; WLF Br. 18-20) that, since Congress may "make or alter" Times, Places and Manner ("TPM") regulations, this Court should refrain from adjudicating the constitutionality of the Measure and leave any corrective to Congress. At best, this argument begs the central questions in this case by assuming that the Measure lies within the legislative power conferred on the states and Congress by the TPM Clause; it also contradicts the arguments of other supporters of the Measure (e.g., USTL Br. 13-14, Neb. Br. 4-19), who say that the Measure was adopted under a "residual" power of the states. But even if the only question were whether the Measure is constitutional as a TPM regulation, it is far too late to suggest that this Court should refrain from adjudicating, and leave to Congress, a claim that a state election regulation violates federal constitutional rights. Federal courts, including this Court, have repeatedly decided such claims on their merits. See, e.g., *Storer v. Brown*, 415 U.S. 724 (1974), and cases cited in notes 76-77 *infra*; cf. *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964) (TPM Clause does not render election issues non-justiciable).

⁶⁵ The adoption of the Arkansas Measure by referendum rather than by the state legislature does not affect its constitutionality.

[Footnote continued]

Petitioners argue half-heartedly that the Measure does not actually bar the disfavored candidates from serving in Congress because a write-in candidacy is feasible. But they know that only one write-in candidate has ever been elected to Congress from Arkansas, *see* State Br. 35, and only a handful have been elected from all other states combined.⁶⁶ They counted on the difficulty of write-in campaigns to achieve their stated goal to "limit the terms of elected officials."⁶⁷ The issue is whether states may erect barriers that seek to exclude certain persons because of a personal characteristic unrelated to their participation in the current electoral process—not whether a barrier is completely impermeable or slightly porous.

Some on the petitioners' side argue that a "qualification" is by definition a characteristic required for formal eligibility to serve, and that even a provision that makes it "impossible as a practical matter for certain individuals to win elections" is not a qualification provision. *See* DH

⁶⁵ [Continued]

See Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981); *Hunter v. Erickson*, 393 U.S. 385, 392 (1969); *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 736 (1964).

⁶⁶ In the thousands of House races since 1958, only three write-in candidates have won. Only one Senator (in 1954) has won on a write-in vote since the passage of the Seventeenth Amendment in 1913. M. Barone & G. Ujifusa, *The Almanac of American Politics 1994*, at 203, 847, 1143 (1993). No write-in candidate has ever been elected to Congress from Washington, the other state with a recent term limits measure that has received judicial scrutiny. *Thorsted*, 841 F. Supp. at 1079-80.

⁶⁷ This Court has repeatedly recognized the difficulty. "[The] opportunity [to cast write-in votes] is not an adequate substitute for having the candidate's name appear on the printed ballot." *Anderson v. Celebrezze*, 460 U.S. 780, 799 n.26 (1983). *See Burdick v. Takushi*, 112 S. Ct. 2059, 2065 n.7 (1992) ("It is clear under our decisions that the availability of a write-in option would not provide an adequate remedy" for an otherwise unconstitutional bar against appearing on the ballot); *Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974) ("access" via write-in votes falls far short of access in terms of having the name of the candidate on the ballot").

Br. 3. Even as a dictionary exercise, this argument is wrong. Most of the cited definitions of "qualification" (State Br. 28-29; DH Br. 14-15) comfortably cover a personal characteristic, specified by law, that will almost always be required as a practical matter to achieve a desired office.⁶⁸

But petitioners' dictionary argument also misses the point. The question in this case is not, strictly speaking, whether limited prior service "is" a qualification, but whether the Measure violates the principle that the qualifications "fixed in the Constitution" may not be supplemented. The Measure does violate that principle in both intent and practice: it seeks to exclude from Congress persons who have what the state deems excessive prior service, and it will almost always succeed. If a state, seeking to impose an occupational qualification but hoping to escape the *Powell* principle, adopted a statute barring non-lawyers from being listed on the ballot, the Court would promptly strike it down as an invalid attempt to impose an additional qualification. The Arkansas Measure deserves the same swift fate.

Storer v. Brown, 415 U.S. 724 (1974), which is further discussed at pages 35-36 *infra*, is entirely consistent with this view. There, the Court correctly rejected a contention that an election ground rule, with which any would-be candidate could have complied, imposed an "additional qualification." *Id.* at 746 n.16. Nothing in *Storer* rescues a measure aimed at defeating certain persons because of

⁶⁸ See 1 William Blackstone, *Commentaries on the Laws of England* 169-70 (1st ed. 1765) ("qualifications" are attributes that render members "capable of being elected"); 2 *Farrand* 250 (Madison) (qualifications are established by laws "limiting the numbers [of persons] capable of being elected"); 2 Samuel Johnson, *A Dictionary of the English Language* 1567 (4th ed. 1773) (defining "to qualify" as "To fit for any thing" or "To make capable of any employment or privilege"); Thomas Dyche, *A New General English Dictionary* (1777) ("something that enables or empowers a person to do that which otherwise he could not").

a personal characteristic unrelated to their participation in the current election process. The real significance of *Storer* is that the question there presented would not have arisen if states were not barred from adding qualifications.⁶⁹

Petitioners argue (*e.g.*, USTL Br. 17-25) that the Measure is merely an attempt to level the playing field against the advantages of incumbency, but with all respect that argument is frivolous. First, the Measure is not limited to current incumbents: anyone who has served three terms in the House or two in the Senate is barred from the ballot for life. Second, the Measure does not deal rationally with any such advantages: if the supposed advantage lies in incumbency itself, there is no reason why the Measure should operate only after three or two terms; and if the supposed advantage lies in length of continuous service, there is no reason why the Measure should count terms that are not consecutive and may be separated by many years in private life. Third, the record contains no evidence of any effort to calibrate the advantages of incumbency so as to achieve a genuinely level playing field; there was none, because that was not the Measure's purpose. Finally, a deliberate state effort to neutralize the perceived advantages of one set of candidates (whether flowing from personal wealth, or name recognition, or past service in Congress or other posts) would not only violate the *Powell* principle but also raise other serious constitutional problems.⁷⁰

⁶⁹ *Hopfmann v. Connolly*, 746 F.2d 97 (1st Cir. 1984), *vacated on other grounds*, 471 U.S. 459 (1985), and *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821 (N.D. Ga.), *aff'd mem.*, 992 F.2d 1548 (11th Cir. 1993), both suggest that the right to run a write-in campaign will turn what would otherwise be considered an impermissible "qualification" into a permissible "ballot access restriction." But both cases involved election-procedure ground rules of the type repeatedly upheld by this Court (*see* pages 36-37 *infra*), not attempts to exclude undesired classes of persons.

⁷⁰ *See Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("[T]he concept that government may restrict the speech of some elements of

As we have shown, the constitutional principle was that the door to service in Congress was to be "open to merit of every description," *The Federalist* No. 52, at 355 (Madison), and that "No qualification of wealth, of birth, of religious faith, or of civil profession, is permitted to fetter the judgment or disappoint the inclination of the people." *The Federalist* No. 57, at 385 (Madison). State exclusion from the ballot of persons who have exhausted their allowed period of service, or are non-lawyers, or have not served in the state legislature is a violation of that principle and ought to be struck down as such.

B. The Arkansas Measure Is Invalid Because a State Does Not Have the Power To Exclude a Qualified Candidate (Who Has Complied with All Applicable Election-Related Requirements) From the Ballot

It is not essential to our position that the Court agree with us that the Arkansas Measure is an attempt to impose an additional qualification, because the other horn of the dilemma is equally lethal for petitioners. A state has no power to bar from the ballot a set of candidates who (by hypothesis) *are* legally qualified and who have complied with all applicable procedural requirements. It has no such power either under the Times, Places and Manner ("TPM") Clause of Art. I, § 4 (as some proponents of term limits urge) or under some inherent power of states (as others urge).

1. State Power Under the TPM Clause

The TPM Clause provides:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Con-

our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."); *id.* at 54 (holding that offsetting the natural advantage of a wealthy candidate is an insufficient reason to justify a limit on candidate's expenditure of personal resources).

gress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The states' power under the TPM Clause is broad, but it is procedural.⁷¹ States may adopt "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983). They may impose ground rules designed to make elections "fair and honest" and impose "some sort of order, rather than chaos" on the electoral process, *see Burdick*, 112 S. Ct. at 2063, or to prevent "voter confusion, ballot overcrowding, or the presence of frivolous candidates[.]" *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986). They may not, however, adopt rules whose purpose is to bar or cripple candidates because of an undesired personal characteristic such as too much experience; such rules simply are not "time, place and manner" regulations, as logic and history show.

If the TPM Clause empowered a state to exclude from the ballot any class of constitutionally qualified persons as to whom it could make a plausible case that their service is undesirable, a state could circumvent the entire notion of a Congress "open to merit of every description." It could bar, for example, non-lawyers,⁷² or felons, or candi-

⁷¹ See *Smiley v. Holm*, 285 U.S. 355, 366 (1932) ("The subject matter is the 'times, places and manner of holding elections for Senators and Representatives.' It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.").

⁷² Cf. 2 *Farrand* 250 (comments of Hugh Williamson) (noting that if qualifications were not fixed in the Constitution, a future statute could require that all members of Congress be lawyers).

dates under age forty, or candidates without prior military service, or persons who have not served in the state legislature. Congress would have even greater power, because the Clause says Congress may by law "make or alter such Regulations."⁷³ Congress presumably could, for example, exclude from the ballot for the Senate any person who has *not* served in the House. The only check on these nightmares would be a new due process and equal protection jurisprudence that this Court would have to develop (under amendments that were not part of the Constitution when the TPM Clause was adopted).

Fortunately, it has been clear since the adoption of the Constitution that the TPM Clause confers power only to establish election procedures, not to skew outcomes against persons with undesired characteristics. Hamilton addressed that point directly in *The Federalist* No. 60. That essay is devoted to answering arguments that the *national* government has too much power over congressional elections. In the penultimate paragraph, Hamilton responds as follows to the concern that Congress might contrive to favor the wealthy:

The truth is that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect, or be elected. But this forms no part of the power to be conferred upon the national government. Its authority [under the "make or alter such Regulations" power] would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections.

Id. at 408-09 (emphasis Hamilton's). If, as Hamilton was explicitly telling the world, the TPM Clause confers only a procedural power that cannot be used by Congress to

⁷³ Cf. *Oregon v. Mitchell*, 400 U.S. 112, 119-23 (1970) (upholding congressional power under TPM Clause to set uniform minimum age for voters in federal elections).

favor the rich, the same Clause plainly confers no power on Arkansas to favor the inexperienced.

The language of the Clause also demonstrates that its reach, while broad, is procedural. The Clause speaks of the "*Manner of holding Elections* for Senators and Representatives" (emphasis added), rather than the "Manner of electing" The phrase chosen focuses on the election process. And of course, as Hamilton explicitly recognized, the words "Times, Places and Manner" were chosen because they are words of process. This Court has borrowed the phrase from Article I, § 4 and used it repeatedly in speech regulation cases. See, e.g., *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2046 (1994). As used in those cases, the phrase signifies procedural rules that restrict speech opportunities but do so in a speaker- and content-neutral manner. The Court's borrowed usage reflects, we suggest, its understanding that when the Framers coined the phrase, they meant to signify procedural rather than substantive rules.

No case in this Court (or any other court to our knowledge) suggests that the TPM Clause empowers a state (or Congress) to impose rules that deliberately hobble a class of undesired candidates in order to make it harder for them to win. In particular, *Storer*, 415 U.S. at 724, is entirely consistent with our argument here. The issue in *Storer* was whether California could bar a candidate from appearing as an "independent" on the general election ballot because he had within the previous year been a registered member of a political party. The Court recognized that California had a legitimate interest in "attempting to ensure that the election winner will represent a majority of the community and in providing the electorate with an understandable ballot." *Id.* at 729. The Court explained that California had established two "route[s] to obtaining ballot position," *id.* at 733, "independent candidacy" and "the direct party primaries." *Id.* It then sustained the California provision on the ground that it "maintain[ed] the integrity of the various

routes to the ballot." *Id.*⁷⁴ It noted as it did so that the provision "involves no discrimination against independents." ⁷⁶

Under the TPM Clause, states may of course bar candidates from the ballot in order to assure an orderly and fair election process by preventing "voter confusion, ballot overcrowding, or the presence of frivolous candidates[.]" *Munro*, 479 U.S. at 194-95. It may, for example, bar candidates who have lost a primary, or otherwise failed to demonstrate sufficient support, or seek to circumvent the party system by posing as independents.⁷⁵ But no case suggests that a state may bar qualified candidates from the ballot because they possess a characteristic unrelated to the election process (*e.g.*, the wrong "civil profession" or, as here, excessive experience) that the state deems undesirable.

⁷⁴ The Court, 415 U.S. at 735, explained:

[The law] protects the direct primary process by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot. It works against independent candidates prompted by short-range political goals, pique, or personal quarrel. It is also a substantial barrier to a party fielding an "independent" candidate to capture and bleed off votes in the general election that might well go to another party.

⁷⁵ *Id.* at 733. Dickey and Hutchison argue (Br. at 28-29) that the Arkansas Measure involves no discrimination because it applies equally to every person who has exhausted the allowed period of service. But a statute barring all doctors from the ballot, on the theory that doctors make bad legislators, would apply equally to all doctors and could be avoided by not going to medical school, and nevertheless would not be within the TPM power. Contrary to DH Br. 28, the Court has struck down requirements that disadvantaged one of the two major parties. See *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986).

⁷⁶ In addition to *Munro*, see *American Party of Texas v. White*, 415 U.S. 767 (1974) (upholding petition requirement for independents and minor parties); *Rosario v. Rockefeller*, 410 U.S. 752 (1973) (upholding 11-month party registration requirement).

Even election-procedure ground rules have, of course, been subject to frequent challenge under the First and Fourteenth Amendments. Since restrictions on participation in the electoral process "implicate[] basic constitutional rights," *Anderson*, 460 U.S. at 786; accord *Williams v. Rhodes*, 393 U.S. 23, 30 (1968), any "severe restriction" must be "narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 112 S. Ct. 698, 705 (1992); accord *Burdick*, 112 S. Ct. at 2063. And any such restriction must be "reasonable [and] nondiscriminatory." *Burdick*, 112 S. Ct. at 2063. Under these standards, the Court has sometimes sustained and sometimes struck down petition requirements, primary election requirements, party registration requirements and filing fees.⁷⁷

But the Court should not even reach the First and Fourteenth Amendment issues in this case, because the Arkansas Measure is fundamentally different from all of these measures. It is not intended to "protect the integrity and reliability of the electoral process itself," *Anderson*, 460 U.S. at 788 n.9, but to make it harder or impossible for persons who have exhausted their allowed periods of service to win. Such a Measure obviously is

⁷⁷ Compare *Norman v. Reed*, 112 S. Ct. 698 (1992) (striking down requirement that more signatures be obtained to appear on local ballot than are required to appear on statewide ballot); *Anderson*, 460 U.S. at 780 (striking down early deadline for submission of petitions) with *American Party v. White*, 415 U.S. at 767 (upholding petition requirement); compare *McCarthy v. Briscoe*, 429 U.S. 1317 (1976) (Powell, J., Circuit Justice) (striking down requirement that candidate be a member of a political party in order to compete in general election); *Tashjian v. Republican Party*, 479 U.S. 208 (1986) (striking down requirement that party hold primary open only to its members) with *Munro*, 479 U.S. at 189 (upholding primary election requirement); compare *Kusper v. Pontikes*, 414 U.S. 51 (1973) (striking down 23-month registration requirement) with *Rosario v. Rockefeller*, 410 U.S. at 752 (upholding 11-month requirement); see *Lubin v. Panish*, 415 U.S. 709 (1974) (striking down excessive filing fees).

not "nondiscriminatory,"⁷⁸ but the more fundamental objection to it is that Arkansas has no power to adopt a Measure whose express purpose is skewing congressional races against disfavored candidates—that, in one court's words, "hobbles a few runners to make sure they lose." *Thorsted*, 841 F. Supp. at 1082.

2. State "Reserved" Powers

Some supporters of the Arkansas Measure (USTL Br. 13-14; Neb. Br. 4-19) argue that Arkansas could adopt the Measure without relying on the TPM Clause, pursuant to a "reserved" power confirmed by the Tenth Amendment. This argument of course contradicts the argument of other supporters who suggest that the Court take comfort from the fact that Congress may supersede the Measure under the "make or alter" power conferred by the TPM Clause. More fundamentally, it contradicts the constitutional text, by suggesting that states have a power to regulate congressional elections that is *not* subject to congressional supersession under the "make or alter" power.

Story answered this point more than 150 years ago. The offices of Senator and Representative were created by

⁷⁸ We agree with and will not repeat the arguments of Amicus The League of Women Voters of the United States that the Measure, even if it were otherwise valid, would violate the First and Fourteenth Amendments. Petitioners argue (*e.g.*, State Br. 33 n.38) that this cannot be so, because term limits applicable to *state* officials have generally been sustained against such a challenge. But the situations are entirely different: a state may, if it chooses, impose a length-of-service disqualification on state offices. See *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892) ("Each State has the power to prescribe the qualifications of its officers"). It may not discriminate against congressional candidates who are constitutionally qualified. Contrary to the views expressed by certain amici (Neb. Br. 10-11), Senators and Representatives are not state officers; they are federal officers elected "by the people." See *Gregory v. Ashcroft*, 501 U.S. 452, 458-62 (1991); *cf. Oregon v. Mitchell*, 400 U.S. at 125 (distinguishing state power over federal elections from power over state and local elections).

the Constitution itself, and the Constitution provides comprehensively for filling them. The Constitution gives the states a large role, but they have no other, "residual" powers:

[T]he states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. They have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president. Each is an officer of the union, deriving his powers and qualifications from the constitution. . . . It is no original prerogative of state power to appoint a representative, a senator, or president for the union. Those officers owe their existence and functions to the united voice of the whole, not of a portion, of the people. . . . No state can say, that it has reserved, what it never possessed.

2 Story, *Commentaries* § 627 (1st ed. 1833).⁷⁹

The text of the Constitution clearly demonstrates an intention to deal with all aspects of elections to Congress. See page 2 *supra*. The whole arrangement is discussed extensively in *The Federalist* Nos. 52-61 in a manner that clearly reflects the understanding of Madison and Hamilton that the Constitution's handling of the subject was comprehensive; states have broad and important powers within the constitutional framework, but none outside it.

Finally, several courts, including this Court, have upheld statutes barring state officials from running for Con-

⁷⁹ Citizens United Foundation argues (Br. at 24-25) that under the Articles of Confederation the states "always held the authority to define the qualifications of their representatives to the national legislature." But the Constitution changed that, deliberately, because one of its purposes was to limit the power of the states over the national government. See *The Federalist* No. 52, at 354 (Madison); 1 *Farrand* 19 (remarks of Edmund Randolph) (primary defect of the Confederation was "that the federal government could not defend itself against the incroachments from the states").

gress while holding state office. *See, e.g., Clements v. Fashing*, 457 U.S. 957 (1982) (upholding a "resign to run" requirement, without reference to the Qualifications Clause); *Joyner v. Mofford*, 706 F.2d 1523 (9th Cir.), *cert. denied*, 464 U.S. 1002 (1983); *Signorelli v. Evans*, 637 F.2d 853 (2d Cir. 1980). As *Joyner* and *Signorelli* made clear, the theory of these cases is not that a state has a reserved power to regulate congressional elections, but that a state (like any other employer, public or private) has a legitimate interest in regulating the conduct and activities of its own officials and can say, "Not while you work here." State laws barring state officials from running for Congress even after resigning their state offices have been struck down. *See Joyner*, 706 F.2d at 1528-29 & n.4.

The Tenth Amendment does not confer powers that did not exist before the Constitution was adopted, nor does it create exceptions where the Constitution has comprehensively dealt with a subject itself. *New York v. United States*, 112 S. Ct. 2408, 2417-18 (1992); *United States v. Darby*, 312 U.S. 100, 123-24 (1941). States have broad power to prescribe "the Times, Places and Manner of holding Elections," but this power flows from the Constitution itself, where it is expressly subject to congressional supersession, and neither a state nor Congress may use it for the purpose of defeating qualified but undesired candidates.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Arkansas should be affirmed.

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October 17, 1994

CONCLUSION

For the foregoing reasons, the Commission is of the opinion that the Commission should be authorized to conduct such investigations as may be necessary to determine the facts and circumstances surrounding the activities of the Commission and to report thereon to the Senate and the House of Representatives.

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APPENDIX**The Arkansas Term Limitation Amendment (in relevant part)**

PREAMBLE: The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of elected officials.

SECTION 3—Congressional Delegation:

(a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas.

(b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas.

U.S. Const. Art. I, § 2, cl. 1

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

U.S. Const. Art. I, § 2, cl. 2

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

U.S. Const. Art. I, § 3, cl. 1

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

U.S. Const. Art. I, § 3, cl. 3

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

U.S. Const. Art. I, § 4, cl. 1

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. Art. I, § 5, cl. 1 (in relevant part)

Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members[.]

U.S. Const. Art. VI, cl. 3 (in relevant part)

[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

U.S. Const. Amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. Amend. XIV, § 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

U.S. Const. Amend. XVII, cl. 1

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

25 22
Nos. 93-1456 and 93-1828

Supreme Court, U.S.

FILED

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

U.S. TERM LIMITS, *et al.*,
v. *Petitioners,*

RAY THORNTON, *et al.*,
Respondents,

WINSTON BRYANT,
Attorney General of Arkansas,
v. *Petitioner,*

BOBBIE E. HILL, *et al.*,
Respondents,

On Writs of Certiorari to the
Supreme Court of Arkansas

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QUESTION PRESENTED

Whether a State may unilaterally impose qualifications upon candidates for the United States Congress by restricting access to the ballot for certain candidates, even though Article I of the United States Constitution sets forth the qualifications for members of Congress as part of a comprehensive scheme for the election of national legislators.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	vi
STATEMENT	1
Amendment 73	2
The Proceedings Below	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE TEXT AND STRUCTURE OF ARTICLE I OF THE UNITED STATES CONSTITUTION SET FORTH A UNIFORM AND EXCLUSIVE SET OF QUALIFICATIONS FOR MEMBERS OF CONGRESS	6
A. The Text And Structure Of Article I Compre- hensively Regulate The Qualifications For And Selection Of Federal Legislators	6
B. The Constitution's Comprehensive Regula- tion Leaves No Room For State Authority Over The Composition Of The National Legislature	10
II. THE HISTORY OF THE CONSTITUTIONAL CONVENTION, THE RATIFICATION DE- BATES, AND THE ACTIONS OF THE EARLY CONGRESSES DEMONSTRATE THAT THE CONSTITUTION ESTABLISHES THE EX- CLUSIVE QUALIFICATIONS FOR FEDERAL LEGISLATORS	12
A. The Convention Debates Confirm That The Qualifications Prescribed By The Constitution For Federal Legislators Are Exclusive	12

TABLE OF CONTENTS—Continued

	Page
1. The Debates Surrounding the Qualifications Clauses Demonstrate That the Framers Rejected Term Limits and Other Qualifications and Intended to Preclude Congress and the States From Imposing Such Requirements	12
2. The Framers Rejected State Control Over Federal Legislators	20
3. Edmund Randolph's Notes From the Committee of Detail Do Not Demonstrate That the Qualifications Prescribed by the Constitution Are Not Exclusive	22
B. The Ratification Debates Confirm That States Have No Authority To Limit The Terms Of Members Of Congress	24
1. Opponents and Supporters Alike Understood That Rotation Had Been Excluded From the Constitution	24
2. The Ratification Debates Reflect a Universal Understanding That the Qualifications Prescribed by the Constitution Were Exclusive	28
C. The Actions Of The Early Congresses Reflect A Recognition That Additional Qualifications Could Be Imposed Only By Amending The Constitution	31
1. The First Congresses Sought to Add Qualifications Through Constitutional Amendment	31
2. The Maryland Election Debates Reveal That Congress Deemed State-Imposed Qualifications to Be Constitutionally Impermissible	33
III. THIS COURT'S PRECEDENTS CONFIRM THAT THE QUALIFICATIONS PRESCRIBED BY THE CONSTITUTION ARE EXCLUSIVE..	34

TABLE OF CONTENTS—Continued

	Page
IV. THE ARKANSAS TERM LIMITATION AMENDMENT ESTABLISHES AN UNCONSTITUTIONAL ADDITIONAL QUALIFICATION FOR MEMBERS OF CONGRESS	36
A. Under Article I, The Constitutional Validity Of Amendment 73 Depends Upon Its Purpose And Effect	37
1. The Purpose and Effect of Amendment 73 Confirm That It Is an Impermissible Qualification for Membership in the National Legislature	37
2. Petitioners' Attempt to Define "Qualifications" Without Regard to Their Purpose and Effect Should Be Rejected.....	42
B. States Have No Authority Under Article I, Section 4 To Exclude Candidates From The Ballot Based On Prior Congressional Experience.....	44
1. The Times, Places and Manner Clause Was Never Intended to Permit States to Dictate Election Results	44
2. Nothing in This Court's Ballot Access Decisions Suggests That States Have Authority to Dictate the Outcome of Federal Elections	47
CONCLUSION	50

TABLE OF AUTHORITIES

CASES	Page
<i>American Party v. White</i> , 415 U.S. 767 (1974)....	48
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983).....	41, 47
<i>Application of Ferguson</i> , 294 N.Y.S.2d 174 (N.Y. Sup. Ct.), <i>aff'd</i> , 294 N.Y.S.2d 989 (N.Y. App. Div. 1968)	37
<i>Burton v. United States</i> , 202 U.S. 344 (1906).....	32
<i>Clements v. Fashing</i> , 457 U.S. 957 (1982).....	37, 48
<i>Danielson v. Fitzsimmons</i> , 44 N.W.2d 484 (Minn. 1950)	37, 38
<i>Dillon v. Fiorina</i> , 340 F. Supp. 729 (D.N.M. 1972) ..	37, 38
<i>Dorchy v. Kansas</i> , 264 U.S. 286 (1924)	40
<i>Exon v. Tiemann</i> , 279 F. Supp. 609 (D. Neb. 1968)	37
<i>Grayson v. Harris</i> , 267 U.S. 352 (1925)	40
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991)	11
<i>Hellmann v. Collier</i> , 141 A.2d 908 (Md. 1958).....	37
<i>Hopfmann v. Connolly</i> , 746 F.2d 97 (1st Cir. 1984), vacated in part on other grounds, 471 U.S. 459 (1985)	44
<i>INS v. Chadha</i> , 462 U.S. 919 (1983)	10
<i>Jenness v. Fortson</i> , 403 U.S. 431 (1971)	48
<i>Joyner v. Mofford</i> , 706 F.2d 1523 (9th Cir.), <i>cert.</i> <i>denied</i> , 464 U.S. 1002 (1983)	37, 44, 48
<i>Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of N.Y.</i> , 360 U.S. 684 (1959) ..	40
<i>Lloyd A. Fry Roofing Co. v. Wood</i> , 344 U.S. 157 (1952)	40
<i>Lubin v. Panish</i> , 415 U.S. 709 (1974)	41
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803)	25
<i>McCulloch v. Maryland</i> , 17 U.S. 316 (1819)	25
<i>Missouri v. Holland</i> , 252 U.S. 416 (1920)	11
<i>Missouri ex rel. Wabash Ry. v. Public Serv. Comm'n</i> , 273 U.S. 126 (1927)	40
<i>Munro v. Socialist Workers Party</i> , 479 U.S. 189 (1986)	48
<i>New York v. United States</i> , 112 S. Ct. 2408 (1992)	11
<i>Nixon v. United States</i> , 113 S. Ct. 732 (1993)	5, 34, 35
<i>In re O'Connor</i> , 17 N.Y.S.2d 758 (1940)	37

TABLE OF AUTHORITIES—Continued

	Page
<i>Portland Ry., Light & Power Co. v. Railroad Comm'n</i> , 229 U.S. 397 (1913)	40
<i>Posadas de Puerto Rico Assocs. v. Tourism Co.</i> , 478 U.S. 328 (1986)	39
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969)	<i>passim</i>
<i>Public Citizen, Inc. v. Miller</i> , 813 F. Supp. 821 (N.D. Ga.), <i>aff'd</i> , 992 F.2d 1548 (11th Cir. 1993)	44
<i>R.A.V. v. City of St. Paul</i> , 112 S. Ct. 2538 (1992) ..	39
<i>Reitman v. Mulkey</i> , 387 U.S. 369 (1967)	40
<i>Rosario v. Rockefeller</i> , 410 U.S. 752 (1973)	48
<i>Schneider Granite Co. v. Gast Realty & Inv. Co.</i> , 245 U.S. 288 (1917)	40
<i>Shub v. Simpson</i> , 76 A.2d 332 (Md. 1950)	37
<i>Shuttlesworth v. City of Birmingham</i> , 382 U.S. 87 (1965)	39
<i>Signorelli v. Evans</i> , 637 F.2d 853 (2d Cir. 1980)	37, 49
<i>Smiley v. Holm</i> , 285 U.S. 355 (1932)	47
<i>State ex rel. Chandler v. Howell</i> , 175 P. 569 (Wash. 1918)	37
<i>State ex rel. Chavez v. Evans</i> , 446 P.2d 445 (N.M. 1968)	37
<i>State ex rel. Eaton v. Schmahl</i> , 167 N.W. 481 (Minn. 1918)	37
<i>State ex rel. Johnson v. Crane</i> , 197 P.2d 864 (Wyo. 1948)	37, 38
<i>Stockton v. McFarland</i> , 106 P.2d 328 (Ariz. 1940) ..	37, 38
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	48, 49
<i>Tafflin v. Levitt</i> , 493 U.S. 455 (1990)	11
<i>Tashjian v. Republican Party</i> , 479 U.S. 208 (1986)	9, 15
<i>Three Affiliated Tribes v. Wold Eng'g, P.C.</i> , 467 U.S. 138 (1984)	39
<i>Thorsted v. Gregoire</i> , 841 F. Supp. 1068 (D. Wash. 1994)	40
<i>United States v. Classic</i> , 313 U.S. 299 (1941)	44
<i>White v. Weiser</i> , 412 U.S. 783 (1973)	47
<i>Wisconsin v. Pelican Ins. Co.</i> , 127 U.S. 265 (1888) ..	33

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS AND STATUTES	Page
U.S. Const. art. 1, § 2	6, 7, 14
art. 1, § 3	6, 7, 14
art. 1, § 4	7
art. 1, § 5	7
art. 1, § 6	14, 32
art. 2, § 1	32
art. 6	19
U.S. Const. amend. XIV, § 3	8
amend. XXII	7
Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 67	32
Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 117	32
Act of May 8, 1792, ch. 37, § 12, 1 Stat. 281	32
Act of Dec. 31, 1792, ch. 1, § 26, 1 Stat. 298	32
Act of July 16, 1862, ch. 180, 12 Stat. 577	32
Ark. Code Ann. § 16-111-106 (1987)	3
1812 N.C. Laws, ch. 6	33
1813 Va. Act, ch. 23	33

OTHER AUTHORITIES

1 ANNALS OF CONG. (Joseph Gales ed., 1789)	31
3 ANNALS OF CONG. (Gales and Seaton eds., 1793) ..	31
15 ANNALS OF CONG. (Gales and Seaton eds., 1806)	31
17 ANNALS OF CONG. (Gales and Seaton eds., 1807)	33, 34
18 ANNALS OF CONG. (Gales and Seaton eds., 1808)	31
CONG. GLOBE, 24th Cong., 1st Sess. 165 (1836)	31
THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITU- TION (Jonathan Elliot ed., 1836)	<i>passim</i>
THE DEBATE ON THE CONSTITUTION (Bernard Bailyn ed., 1993)	<i>passim</i>
THE FEDERALIST (Clinton Rossiter ed., 1961)	<i>passim</i>
THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1966)	<i>passim</i>
JOSEPH STORY, COMMENTARIES ON THE CONSTITU- TION OF THE UNITED STATES (4th ed. 1833)	43

TABLE OF AUTHORITIES—Continued

	Page
United States Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES (113th ed. 1993)	41
CHARLES WARREN, THE MAKING OF THE CONSTITU- TION (1928)	7, 17, 22
GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969)	16, 21
THE WRITINGS OF GEORGE WASHINGTON (John C. Fitzpatrick ed.)	21
THE WRITINGS OF THOMAS JEFFERSON (Paul Leicester Ford ed., 1895)	25

**BRIEF FOR RESPONDENT
CONGRESSMAN RAY THORNTON**

STATEMENT

During the debates over the ratification of the proposed Constitution, opponents mounted unsuccessful efforts in several States to amend the document in order to provide for term limits for members of Congress—a limitation the Framers had eliminated during the Constitutional Convention. More than 200 years later, petitioners and their supporters contend that the Framers' rejection of term limits was meaningless and that anti-Federalist efforts to amend the Constitution to provide for rotation were entirely superfluous. According to petitioners, States have always possessed the authority to impose additional qualifications for membership in Congress without following the process for constitutional amendment specified in Article V. Thus, they maintain that an amendment to the Arkansas constitution expressly designed to "disqualify congressional incumbents from further service" (Pet. App. 15a) is constitutionally permissible.

These contentions are profoundly mistaken. As the anti-ratification forces clearly recognized two centuries ago, the text and structure of Article I preclude the imposition of additional qualifications for membership in Congress by any means other than by amending the Constitution itself. Moreover, as this Court acknowledged in *Powell v. McCormack*, 395 U.S. 486 (1969), the history surrounding the drafting and adoption of Article I reinforces what the text and structure reveal—that the Framers eliminated term limits and other then-common disabilities and prescribed only a limited, and exclusive, number of qualifications to ensure voters the widest possible choice of federal representatives.

Amendment 73, by contrast, seeks to circumscribe the choice of individual voters in federal elections and to disable permanently a specific class of candidates for Con-

gress. Whether such limitations are wise as a matter of public policy is not the issue in this case. The language and structure that the Framers chose for Article I prevents the adoption of term limits, or any other qualifications for congressional office, by individual States. If such limitations are to be imposed, they must be adopted by amending the Constitution itself.

Amendment 73

The first words of Amendment 73 label it the "Arkansas Term Limitation Amendment." Pet. App. 2a. Its preamble further states that the people of Arkansas have found that entrenched incumbency causes elected representatives to be "preoccupied with reelection and [to] ignore their duties as representatives." Pet. App. 3a. It further postulates that "entrenched incumbency" has "reduced voter participation" and has created an electoral system that is "less representative than the system established by the Founding Fathers." *Id.* "Therefore," the preamble concludes, "the people of Arkansas, exercising their reserved powers, *herein limit the terms of the elected officials.*" Pet. App. 4a (emphasis added).

To that end, Amendment 73 provides that "[a]ny person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas." *Id.* The same language is used for United States Senators, except that they are limited to "two or more terms." Pet. App. 5a.¹

The Proceedings Below

Shortly after Amendment 73 was adopted, respondents Bobbie Hill and the League of Women Voters of Arkansas filed this suit in Pulaski County Circuit Court seeking

¹ Amendment 73 also limits the terms of state elected officials and representatives. These provisions are no longer at issue in this case.

a declaratory judgment invalidating the Amendment. Pursuant to an Arkansas statute requiring plaintiffs to name as defendants "all persons . . . who have or claim any interest which would be affected by the declaration," the complaint named, among other defendants, the Arkansas delegation to the United States Congress, including respondent Ray Thornton. See Ark. Code Ann. § 16-111-106 (1987).

Several of the defendants, including Representative Thornton, sought a declaratory judgment that Amendment 73 is unconstitutional insofar as it establishes an additional qualification based on prior service for membership in Congress. The parties filed cross-motions for summary judgment. Thereafter, on July 29, 1993, the Pulaski County Circuit Court held that Amendment 73 "is as much a qualification as wealth, position or poverty," and that the power to restrict the number of terms served is "a power given by the whole body politic to the Constitution which cannot be usurped by individual actions of the several states." Pet. App. 49a.

The Arkansas Supreme Court agreed that the provisions of Amendment 73 limiting the terms of federal legislators are unconstitutional. The court held that the Framers created uniform rules for the qualification of federal legislators, and precluded the States from establishing "sundry experience criteria . . . [that] would cause variances in this uniformity and lead to an imbalance among the states with respect to who can sit in Congress." Pet. App. 14a. It rejected the claim that Amendment 73 is not a qualification but instead a mere ballot access regulation, finding that "[t]he intent and effect of Amendment 73 are to disqualify congressional incumbents from further service." Pet. App. 15a.

SUMMARY OF ARGUMENT

I. Article I of the Constitution creates the national legislature and comprehensively regulates its composition and selection. As part of this comprehensive scheme, the so-called "Qualifications Clauses" prescribe the uniform and exclusive attributes for membership in each House of Congress, using language that parallels the language used in Article II to create the exclusive qualifications for the office of the President. Article I also provides for any limitations on the broad pool of potential candidates otherwise defined by the Qualifications Clauses.

Although Article I grants States authority to prescribe the qualifications of electors, it delegates no similar authority to the States (or to Congress) concerning the qualifications of who may be elected. And in delegating to States the authority to conduct the local functions necessary to elect a national legislature, Article I cabins this power by granting Congress an extraordinary authority to make or alter state election laws.

Because it comprehensively regulates the composition of the national legislature and delegates to the States carefully circumscribed authority in related areas but not in the critical area of legislative qualifications, the text and structure of Article I leave no room for States to establish additional qualifications for membership in Congress. Given the uniquely national concerns at stake in the composition of a national legislature, the Tenth Amendment can reserve no authority to the States in this area. Rather, Article I's comprehensive regulation completely pre-empts State authority to prescribe the characteristics of federal legislators.

II. The history surrounding the drafting, ratification and early interpretation of the Constitution shows overwhelmingly that the Framers intended what the text and structure plainly reveal—*viz.*, that the qualifications set forth in Article I are exclusive. Writing at a time when state constitutions prescribed numerous and varying qualifications, the Framers explicitly considered and rejected a number of requirements, including a rotation or term

limit proposal. They did so for reasons that are antithetical to state imposition of such limitations, and their statements and actions make clear that they did not believe States retained any authority over federal legislative qualifications. Indeed, the Framers considered but did not adopt proposals to delegate authority to the States to prescribe certain types of qualifications.

The anti-ratification forces understood that the Constitution omitted term limits, and that this omission could be remedied only by amending the Constitution itself. In attempting to placate this opposition, proponents never suggested that States could add qualifications. To the contrary, they argued that the recitation of a minimal and exclusive set of qualifications was beneficial, and they opposed efforts to amend Article I to include term limits on the ground that such limitations abridged the people's right to choose their representatives in Congress. Consistent with this understanding, the early Congresses considered and rejected constitutional amendments to provide for term limits and deemed additional state qualifications unconstitutional.

III. This Court's precedents confirm that the constitutional qualifications are exclusive. Relying on the foregoing history, this Court has held that the *only* qualifications that may be imposed for membership in Congress are those specified in the Constitution. *Powell v. McCormack*, 395 U.S. 486 (1969); *Nixon v. United States*, 113 S. Ct. 732 (1993).

IV. Amendment 73 establishes an additional, and thus unconstitutional, qualification for members of Congress. The Arkansas courts concluded that both the purpose and the effect of the law is to disqualify congressional incumbents from further service. That finding is clearly correct. Amendment 73 declares that it was enacted for the express purpose of limiting the terms of incumbents, and indeed, that is its only purpose. The Arkansas courts' finding that exclusion of incumbents from the ballot will accomplish this goal is supported by the record in this

case, as well as the history of write-in candidacies throughout this century.

Petitioners' suggestion that Amendment 73 is permissible because it does not bar from Congress an incumbent who somehow manages to win as a write-in is fundamentally flawed. Whether a law creates an additional qualification is to be determined not by resort to narrow dictionary definitions, but by reference to the essential democratic principles that the Framers sought to enshrine in Article I—namely, that the door to the national legislature should be open to all and that voters should be allowed to vote for whomever they please. Judged under this standard, a ballot exclusion law that disqualifies persons based upon prior service is plainly an improper qualification.

Nor can Amendment 73 be justified as a mere ballot access regulation. Unlike earlier laws that this Court has sustained, Amendment 73 is not an even-handed regulation designed to facilitate voter choice, nor does it regulate the conduct of state officeholders. Rather, the term limit law manipulates election procedures in order to disable an identifiable class of persons from service in the federal legislature. Such manipulation is entirely outside the authority of States under the Times, Places and Manner Clause.

ARGUMENT

I. THE TEXT AND STRUCTURE OF ARTICLE I OF THE UNITED STATES CONSTITUTION SET FORTH A UNIFORM AND EXCLUSIVE SET OF QUALIFICATIONS FOR MEMBERS OF CONGRESS.

A. The Text And Structure Of Article I Comprehensively Regulate The Qualifications For And Selection Of Federal Legislators.

Article I sets forth a comprehensive scheme for the composition and election of the national legislature. Article I addresses who may choose federal legislators (§ 2, cl. 1),² who may be chosen (§ 2, cl. 2 and § 3, cl. 3),

² Section 2, Clause 1 provides that the members of the House shall be chosen "by the People of the several States." Section 3,

and how often they are to be chosen (§ 2, cl. 1 and § 3, cl. 1). It also grants to Congress the authority to "make or alter" the regulations of the States respecting the "Times, Places, and Manner of holding elections for Senators and Representatives" (§ 4, cl. 1), to judge the "Elections, Returns, and Qualifications of its own Members," (§ 5, cl. 1), and to expel members (§ 5, cl. 2). In language that is both broad and specific, Article I creates the national legislature and addresses every facet of its composition and selection.

Most pertinent to this case are Section 2, Clause 2 and Section 3, Clause 3 of Article I. These so-called "Qualifications Clauses" prescribe three minimal requirements for members of Congress: age, number of years of United States citizenship, and place of inhabitancy. They do so, moreover, in language that the Framers understood to preclude alteration except through other constitutional provisions. The negative wording the Framers used in these provisions (*i.e.*, "No person shall be a [Representative or Senator] who shall have . . .") is used in Article II, Section 1, Clause 5 to prescribe the qualifications for the office of the President.³ Just as a constitutional amendment was necessary to add a qualification based on tenure for this office of the national government (see amend. XXII), so too a constitutional amendment is nec-

Clause 1 originally provided that the two Senators from each state were to be "chosen by the legislature thereof." In 1913, the Seventeenth Amendment modified this provision to permit popular election of Senators. The determination of which "people" are qualified to vote is also fixed by Article I, Section 2 (and by the Seventeenth Amendment's later adoption of Section 2's standard).

³ This negative formulation was also used in several state constitutions in 1787 to establish exclusive qualifications. See CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 422-23 n.1 (1928) (hereinafter "WARREN"). As this Court has previously explained, the negative phrasing was introduced in Article I by the Constitutional Convention's Committee of Style and was not intended to render the qualifications non-exclusive. *Powell*, 395 U.S. at 538-39.

essary to add such qualifications for members of the national legislature.

The text of the Constitution also prescribes specific limitations on the broad pool of candidates otherwise defined by these qualifications. Article I, Section 6, Clause 2 prohibits persons holding office "under the United States" from being members of either House while their tenure in office continues.⁴ Article VI, Clause 3 requires that members of the House and Senate must agree to be bound by oath or affirmation to uphold the Constitution and, as an adjunct, provides that this requirement does not permit the imposition of any form of religious test.⁵ Although petitioners note these provisions (State Br. at 37-38, Term Limits Br. at 49), they misconstrue their import: each highlights the fact that, where the Framers saw a need to disqualify a class of candidates, they did so in the text of the Constitution itself. The Framers did not leave the resolution of such issues to the States.

The extent of this control over the election of federal legislators is further reflected in Congress's power under Section 4 to "make or alter" state laws regulating congressional elections. This unique authority goes far beyond Congress's traditional power under the Supremacy Clause to pre-empt or supplant state law through the creation of federal laws. See art. VI, cl. 2. Section 4 actually grants Congress the power to exercise the legislative authority of a particular State and to make or amend that State's election laws. Such an extraordinary grant of authority reflects the Framers' commitment to a uniform

⁴ James Madison listed this disqualification, together with the requirements specified in Sections 2 and 3, as the uniform and constitutionally regulated "qualifications of the elected." See *THE FEDERALIST* No. 52, at 326 (Clinton Rossiter ed., 1961) (hereinafter "*THE FEDERALIST*").

⁵ The Fourteenth Amendment also adds to the Constitution a provision disqualifying from service in Congress anyone who fought on behalf of the Confederacy during the Civil War. See U.S. Const. amend. XIV, § 3.

scheme for the qualification, election, and assembly of a wholly national legislature.

Article I, Section 2 likewise imposes a significant limitation upon the States' constitutionally delegated authority to determine the qualifications of voters. Although petitioners attempt to characterize this provision as a "'comprehensive' delegation of power" (State Br. at 12), it contains an important internal check on the exercise of the authority granted. In order "to prevent the mischief which would arise if state voters found themselves disqualified from participation in federal elections" (*Tashjian v. Republican Party*, 479 U.S. 208, 228 (1986)), the Framers specified that the qualifications of voters in congressional elections must match those that the State requires for electors of the most numerous branch of its own legislature. Section 2 thus precludes States from creating unique qualifications for voting in federal elections, and permits States to disenfranchise federal electors only insofar as they are willing to strip their citizens of the right to vote altogether.⁶

The structure of Article I, Sections 2 and 3 underscores the exclusively constitutional nature of qualifications for federal legislators. The second clause of Section 2, the Qualifications Clause for House members, follows immediately after the clause providing that the electors in each State must have the same qualifications as the electors for the most numerous branch of the state legislature. Plainly, the Framers knew how to delegate authority to the States with respect to qualifications and did so in the case of electors. They did not do so, however, in the case of those who may be *elected*. That silence under-

⁶ The Framers saw this self-policing mechanism as an important check on state authority. Leaving the qualification of federal electors "to the legislative discretion of the States would have been improper," James Madison explained, because "it would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone." *THE FEDERALIST* No. 52, at 326.

mines completely petitioners' claim that States were granted plenary authority to impose qualifications.

The Framers' decision not to grant States authority over the qualifications of federal legislators is likewise reflected in the structure of Section 3. The first two paragraphs of this Section set forth the length of senatorial terms, empower state legislatures to choose Senators, stagger the terms of the first three classes of Senators, and authorize States to fill vacancies. The paragraph setting forth qualifications follows immediately thereafter. Again, however, the Framers omit any reference to state authority in this last, and crucial, provision.

B. The Constitution's Comprehensive Regulation Leaves No Room For State Authority Over The Composition Of The National Legislature.

As the text and structure of Article I show, the exclusivity of the qualifications of federal legislators embodied in Article I "was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787." *INS v. Chadha*, 462 U.S. 919, 946 (1983). The Framers created a new national legislature, comprehensively prescribed the qualifications (and any departures from those qualifications) for its members, and expressly delegated to the States carefully circumscribed authority to perform the local functions necessary to the election of a national legislature. Petitioners are thus wrong in arguing that the Constitution is "silent" or at least "ambiguous" with respect to the States' authority to add qualifications for representatives to Congress. State Br. at 39; Term Limits Br. at 7, 32. By addressing the issue of qualifications comprehensively, and by delegating to the States circumscribed authority in related areas, but not in the critical area governing the qualifications of federal legislators, the Constitution leaves no room for States to establish such qualifications.

Petitioners' reliance on the Tenth Amendment is thus misplaced. Given the peculiarly national concerns at

stake in the composition of a national legislature elected by the "People of the *several* States," (art. I, § 2 (emphasis added)), the text and structure of Article I pre-empt the authority of individual States in this exclusively federal area. By defining the fundamental characteristics of the national legislature, these provisions define a sovereignty that is, by its very nature, beyond the scope of state authority. Thus, unlike the cases petitioners rely upon, this case does not concern "the structure of [the State] government, and the character of those who exercise [State] government[al] authority." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (judges); see also *Tafflin v. Levitt*, 493 U.S. 455, 458-61 (1990). Nor does it involve any congressional attempt "to employ state governments as regulatory agencies." *New York v. United States*, 112 S. Ct. 2408, 2421 (1992).

Because the Constitution speaks to the issue here in specific terms, the question of reserved powers simply does not arise. (Cf. *id.* at 2417 ("[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the states"). Indeed, the principle that state authority over a uniquely federal matter is pre-empted by the mere fact of congressional action in that area must apply with even greater force here, where the Constitution itself, rather than a treaty or federal law, speaks in comprehensive terms to the federal issue. Cf. *Missouri v. Holland*, 252 U.S. 416, 434-35 (1920) (Tenth Amendment could not support state law in the face of a treaty involving a "national interest of very nearly the first magnitude"). Thus, given the language and structure of Article I governing congressional elections, only an express delegation of authority could allow the States to limit the length of service for members of the national legislature. Petitioners cannot identify any such delegation of authority in the Constitution.

II. THE HISTORY OF THE CONSTITUTIONAL CONVENTION, THE RATIFICATION DEBATES, AND THE ACTIONS OF THE EARLY CONGRESSES DEMONSTRATE THAT THE CONSTITUTION ESTABLISHES THE EXCLUSIVE QUALIFICATIONS FOR FEDERAL LEGISLATORS.

Far more than the language and structure of Article I, however, dictate that Amendment 73 is unconstitutional. The history surrounding the drafting, ratification and early interpretation of the Constitution's prescription of qualifications provides overwhelming evidence that the Framers intended precisely what Article I itself demonstrates—*i.e.*, that, subject to only a few essential qualifications, voters should have the right to choose anyone they wish to represent them in the national legislature.

A. The Convention Debates Confirm That The Qualifications Prescribed By The Constitution For Federal Legislators Are Exclusive.

1. The Debates Surrounding the Qualifications Clauses Demonstrate That the Framers Rejected Term Limits and Other Qualifications and Intended to Preclude Congress and the States From Imposing Such Requirements.

As both petitioners note, during early debates over the Qualifications Clauses, John Dickinson opposed “any recital of qualifications in the Constitution” because in his view, “[i]t was impossible to make a compleat [list] and a partial one would by implication tie up the hands of the Legislature from supplying the omissions.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 123 (Max Farrand ed., 1966) (hereinafter “FARRAND”). In suggesting that States retain the authority to fill such gaps, petitioners completely miss the import of Dickinson’s comment. The Framers acted not because of, but in spite of, his observation that a prescription of qualifications *would* preclude the adoption or imposition of others. Accordingly, the Framers deliberately chose to recite a bare—and uniform—minimum of qualifications. See *Powell*, 395 U.S. at 533 (noting that Dickinson’s position

“was rejected”) (emphasis added).⁷ Writing at a time when state constitutions (themselves only recently drafted) imposed numerous and diverse eligibility requirements for state legislators, the Framers intentionally placed a few explicit restrictions on the people’s choice of potential federal representatives, leaving no room for either federal or state legislatures to add other restrictions.

Rotation. Most significantly, the Framers deliberately rejected a term limitation, or rotation, requirement similar to Arkansas Amendment 73. As originally proposed, the Virginia Plan expressly provided that members of the federal legislature would be “incapable of re-election for the space of — after the expiration of their term of service.” 1 FARRAND 20 (omission in original).⁸ The Convention never attempted to choose a period of ineligibility. Instead, on June 12th, the Framers agreed, without dissent, to delete this provision. Although the Convention revisited numerous other decisions (see, *e.g.*, *infra* at 19 n.19, 20-21), rotation for federal legislators was never again proposed.

⁷ The Court’s observation likewise applies to the other comments petitioners cite. Term Limits Br. at 41. Moreover, petitioners misconstrue James Wilson’s statement. Wilson, who was so “agst. abridging the rights of election in any shape” that he opposed even an age qualification (1 FARRAND 375), objected to giving Congress unlimited authority to set qualifications because this would render the Constitution’s prescription superfluous. 2 FARRAND 251. Nor is there any merit to the suggestion (Term Limits Br. at 41) that an inference of exclusivity would arise only from a “long[er] or [more] detailed” list of qualifications.

⁸ The State mistakenly asserts that the Virginia Plan initially stated that “any person possessing [certain previously recited] qualifications may be elected except.” State Br. at 41 (emphasis omitted). The Virginia Plan contained no such language. See 1 FARRAND 20-22 (setting forth the fifteen Virginia Resolutions). The language to which the State refers appears in notes Edmund Randolph took as a member of the Committee of Detail. See 2 FARRAND 137 n.6. As respondent demonstrates below, petitioners completely misconstrue the significance and meaning of those notes. See *infra* at 22-23.

Petitioners mistakenly contend that this provision was deleted because the Framers wished to avoid excessive detail in the Constitution (Term Limits Br. at 39) and because they preferred a non-uniform rule on rotation. *Id.*; State Br. at 43. The Framers did not “drop” rotation as “too detailed” for inclusion in a constitution. After agreeing to a national legislature with two branches, the first of which was to be elected by the people of the several States (1 FARRAND 47-50), they “postp[one]d” consideration of *all* “[t]he remaining Clauses of Resolution 4th relating to the qualifications of members of the National Legislature.” *Id.* at 50-51 (emphasis added; brackets omitted).⁹

When they returned to the subject two weeks later, the Framers did not mention either of petitioners’ proffered reasons for jettisoning the rotation provision. See *id.* at 217. Both then and later, the Convention entertained far more detailed proposals on such matters as the compensation to be paid federal legislators¹⁰ and included provisions corresponding to all of the “postponed” clauses *except* rotation.¹¹ Nor did a single delegate oppose rotation because it was uniform. To the contrary, a desire for uniformity animated the debates in a host of areas,¹²

⁹ The “remaining clauses” concerned frequency of elections, length of terms, amount and source of compensation, minimum age requirement, ineligibility for state or federal offices, and rotation. 1 FARRAND 20-21.

¹⁰ For example, the delegates discussed whether the Constitution should have a clause tying congressional compensation to the value of a commodity such as wheat (1 FARRAND 216) or a formula based on the distance a representative traveled to and from the Capital. 2 FARRAND 293.

¹¹ Compare 1 FARRAND 20 (Fourth Resolution of the Virginia Plan) with art. I, § 2, cls. 1-2; art. I, § 3, cls. 1, 3; art. I, § 6.

¹² See, e.g., 1 FARRAND 216 (Mason) (opposing payment of congressional salaries by the States because the States “would make different provision . . . and an inequality would be felt among them, whereas . . . they ought to be in all respects equal”); *infra* at 18 (discussing opposition to diverse property qualification). In later referring to the “material diversity” within Congress

and in those few instances when the Framers thought a rule necessary and uniformity impossible—e.g., the qualifications of electors or the standards for residency—they made an explicit and circumscribed delegation of the subject to the States.¹³

Viewed in its historical context, the deletion of the rotation provision was a fully informed, deliberate rejection of the concept. The Framers were well-acquainted with term limits, which, then as now, were popular in some quarters. Ten state constitutions included rotation requirements for a variety of state legislative and executive offices and/or for delegates to the Congress created by the Articles of Confederation, and the Articles themselves provided for rotation.¹⁴ Moreover, many delegates had experienced term limits first-hand. James Madison had been barred from additional service in Congress, and other delegates had had similarly unfavorable experiences. WARREN at 613. Only a few years prior to the Convention, reformers in Virginia led by Madison and in Pennsylvania led by Wilson and Robert Morris had begun attacking state rotation requirements “as leading to instability and confusion” in government and “depriv[ing] [the people] of the right of choosing those persons whom

(see Term Limits Br. at 36 n.54), Hamilton referred to the “disposition [of] . . . representatives towards the different ranks and conditions in society,” not to the *rules* governing their qualifications for membership in the national legislature. See THE FEDERALIST No. 60, at 367 (emphasis added).

¹³ In the case of electors, Wilson noted that “[i]t was difficult to form any uniform rule of qualifications for all the States.” 2 FARRAND 201. Madison later explained that a “uniform rule would probably have been as dissatisfactory to some of the States as it would have been difficult to the convention.” THE FEDERALIST No. 52, at 326. See also *Tashjian v. Republican Party*, 479 U.S. 208, 227-28 (1986) (summarizing Convention debate). As several delegates noted, residency was also a hotly disputed concept in the States. 2 FARRAND 217 (Madison, G. Morris, Mercer).

¹⁴ See State App. 3b, 5b, 6b-7b, 14b, 19b, 20b, 22b-24b, 27b, 31b and 34b (citing state constitutions); App. 1a (Article V of the Articles of Confederation).

they would prefer." GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* at 436, 439 (1969) (hereinafter "WOOD").

Given the growing controversy surrounding rotation and the extensive debate over other qualification provisions (see *infra* at 17-19), it is inconceivable that, without a single word on the subject, the Framers deleted the rotation clause in order to confer authority on the States to adopt 13 different term limit rules. When they intended to leave regulation of a qualification to the States, the Framers did so expressly. And, in stark contrast to property qualifications, where significant differences in state economies produced widely divergent property ownership requirements (see *infra* at 16-17 & n.15), no regional distinctions rendered a uniform rule on rotation difficult to formulate, as the Articles of Confederation themselves attest.

Comments the delegates made on related subjects, moreover, make clear their understanding that they had eliminated rotation from the federal legislative scheme. During debate on a term limit for the President, for example, Gouverneur Morris noted that if, as proponents claimed, rotation was "the palladium of Civil liberty," the concept should be applied to the Legislature as well. "[Y]et no one," he said, had "conceived that the members of it should not be re-eligible." 2 FARRAND 120. Speaking in early opposition to property qualifications, Dickinson stated that it was "improper that any man of merit should be subjected to disabilities in a Republic where merit was understood to form the great title to public trust, honors & rewards." *Id.* at 123. These statements, which petitioners ignore, cannot be reconciled with their contention that the Framers understood States to have the authority to impose a patchwork quilt of rotation and other restrictions on who could serve as a federal legislator.

Property Requirements and Debtor Status. Elimination of rotation, moreover, was consistent with the Framers' rejection of other then-prevalent qualifications. In 1787, nearly every state constitution included a property qualification for state legislators, with the amounts varying

widely from state to state.¹⁵ Similarly, the constitutions of all but two States established religious qualifications for state legislators, which, as the Framers had reason to know, rendered Catholics, Jews and even members of some Protestant denominations ineligible for office. See WARREN at 425-26. The failure to include these then-common qualifications in the federal Constitution reflected a conscious rejection of obstacles to federal office.

In attempting to prove otherwise, petitioners argue that the Framers rejected property qualifications either because they opposed giving *Congress* the authority to establish the qualification (Term Limits Br. at 39-40) or because they opposed a uniform rule. State Br. at 43. The debates surrounding this proposal, however, flatly refute these claims.

Noting that the Committee of Detail had "reported no qualifications because they could not agree on any" (2 FARRAND 249), John Rutledge proposed on August 10th "that the qualifications *should be the same as for members of the State Legislatures.*" *Id.* at 251 (emphasis added). Oliver Ellsworth, a strong state-rights proponent, likewise proposed to delegate property qualifications for federal legislators to the States.¹⁶ Although, just three days earlier, the Convention had agreed to leave the qualifications of electors to the States for precisely the same reason—*i.e.*, the difficulty of agreeing on a uniform rule (see n.13, *supra*)—no delegate seconded these proposals. Nor did anyone suggest that such a proposal was unnecessary be-

¹⁵ In South Carolina, a state senator had to own a freehold of at least 2000 pounds, while Delaware required only that its representatives be freeholders. See State App. 2b, 31b.

¹⁶ Ellsworth argued that it was "improper to have either *uniform* or *fixed* qualifications[.]" and that "it was better to leave this matter to the Legislative discretion than to attempt a provision for it in the Constitution." 2 FARRAND 249 (emphasis in original). His endorsement of *varying* qualifications, and his proposal to eliminate any provision in the Constitution, necessarily entailed leaving the matter to the States. See WARREN at 419 (so interpreting Ellsworth's statement).

cause States already possessed such authority. The Convention thus failed to adopt an explicit proposal that would have conferred on the States the very authority that petitioners claim was so obvious that the Framers never "questioned" its existence. Term Limits Br. at 42.

The Convention did so, moreover, for reasons that are antithetical to state-imposed term limits. Rutledge and Ellsworth aside, proponents of such a requirement urged that Congress be authorized to "establish such *uniform* qualifications of the members of each House, with regard to property." 2 FARRAND 248 n.6 (emphasis added). Opponents led by Franklin argued that there should be no property qualification at all. Others, led by Madison, objected to leaving the matter to Congress, not because it was the *wrong* body, but because *no* institution should have such power. According to Madison, the qualifications of representatives "were fundamental articles in a Republican Govt. and ought to be *fixed by the Constitution*." *Id.* at 249-50 (emphasis added).¹⁷ Each reason is incompatible with the reservation of state authority to impose qualifications.

The Framers also rejected proposals to exclude "Pensioners" and "such persons as are indebted to, or have unsettled accounts with the United States." 2 FARRAND 117. Supporters of these proposals noted that in many States, debtors had become members of the legislatures in order to promote laws that sheltered their delinquencies. *Id.* at 121 (Mason). Nevertheless, numerous delegates argued against the proposals because they would exclude too many people from legislative service. See *id.* at 125-27 (Gorham, Langdon, Wilson, G. Morris, Ellsworth, and Pinckney). As Wilson noted, the Convention was "providing a Constitution for future generations, and not

¹⁷ The dangers Madison associated with a legislative power to establish qualifications are by no means limited to Congress. His concern that "[q]ualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partizans of a weaker faction" (2 FARRAND 250 (internal citations and brackets omitted)) applies as much to state as to federal authority to prescribe qualifications for federal legislators.

merely for the peculiar circumstances of the moment" (*id.* at 125), an observation plainly at odds with any scheme conferring open-ended authority on the States to add whatever measures "the peculiar circumstances of [future] moment[s]" might suggest to them.

The history surrounding the Convention's rejection of various qualifications¹⁸ thus completely belies petitioners' claims that the Constitution establishes only a qualifications floor to which the States may add as they see fit. State Br. at 36-37. The absence of requirements based on property, solvency, and nonincumbency were the product of often extensive debate, negotiation and compromise. For a State to add qualifications based on property ownership or non-incumbency would inescapably alter the balance the Framers consciously struck.¹⁹

¹⁸ Despite their prevalence, the Convention never even considered a religious qualification for Congress. The Framers later added a clause prohibiting religious tests (*see* art. VI, cl. 3), not because they believed States would otherwise be free to impose such requirements (State Br. at 38; Term Limits Br. at 49), but to ensure that the Constitution's "oath" requirement did not itself create a religious test. See 2 FARRAND 342, 468 n.24. Nor was such a concern unfounded. The South Carolina ratifying convention proposed that the prohibition be amended to provide that "no *other* religious Test" could be prescribed. "The Ratifications and Resolutions of Seven State Conventions," 2 THE DEBATE ON THE CONSTITUTION 556 (Bernard Bailyn ed., 1993) (hereinafter "BAILYN") (emphasis added).

¹⁹ This exclusivity is likewise confirmed by the history of the citizenship qualifications the Framers did adopt. On August 9th, the delegates debated whether the period of citizenship for Senators should be 4, 10, 13, or 14 years before they settled on a 9-year period. 2 FARRAND 235-39. Four days later, they debated 3, 7 and 9-year periods of citizenship for members of the House, as well as a proposal to leave the matter entirely to Congress, before fixing the period at 7 years. *Id.* at 268-69. It is clear from the debates that the 7 and 9-year periods of citizenship are ceilings as well as floors, and that States have no authority to add additional years of citizenship.

2. *The Framers Rejected State Control Over Federal Legislators.*

Throughout their briefs, petitioners suggest that *States* have representatives, and that Members of Congress represent the *State's* interest in the national legislature. Term Limits Br. at 25, 42; State Br. at 40. From this they reason that the States must have the right to dictate who can represent them in Congress. The Framers, however, envisioned no such system.

Addressing the question of congressional compensation, Madison proposed on June 12th that the amount be fixed in the Constitution, noting that "it would be improper to leave the members of the Natl. legislature to be provided for by the State Legisls.: because it would create an improper dependence." 1 FARRAND 215-16. The delegates then voted that congressional salaries should be paid out of the National Treasury. *Id.* at 216. When, on June 22nd, Ellsworth re-opened the issue, Randolph, King, Wilson, Madison and Hamilton all strenuously opposed state funding. As Randolph put it, "[If] the States were to pay the members of the Natl. Legislature, a dependence would be created that would vitiate the whole System. *The whole nation has an interest in the attendance & services of the members.*" *Id.* at 372 (emphasis added). Wilson likewise "thought it of great moment that the members of the Natl. Govt. should be left as independent as possible of the State Govts. *in all respects.*" *Id.* at 373 (emphasis added and brackets omitted). Ellsworth's motion was defeated (*id.* at 374), as was his later attempt to provide for state payment of Senators. *Id.* at 427-28.

Nevertheless, the report prepared by the Committee of Detail provided that the compensation for members of both Houses would be controlled by the States. 2 FARRAND 180. During the debates that led to the elimination of this provision, most of the delegates who spoke (including, surprisingly, Ellsworth) opposed the measure because of the undue influence it would permit States to

exercise over Congress. See *id.* at 290-92 (Ellsworth, Langdon, Madison, Gerry, Mason, Carroll and Dickinson). In response to Luther Martin's argument that Senators should be paid by the States because they represent them, Daniel Carroll argued that "[t]he Senate was to represent & manage the affairs of the whole, and not to be the advocates of State interests." *Id.* at 292.

In light of these efforts to free Congress from dependence upon the States, the notion that States can "set qualifications for their congressmen," and have "power over their characteristics" (State Br. at 40) would have been entirely repugnant to the Framers. Nor would the repugnance be lessened by the fact that, in this case, a majority of Arkansas voters, rather than the Arkansas legislature, adopted Amendment 73. The Framers denied States authority to set qualifications and limited their influence over federal legislators not because they believed state legislatures failed to reflect the will of their people, but because they believed state legislatures were too attentive to local views and thus too parochial in their approach to national problems.²⁰ The reasons for preventing state interference, therefore, apply equally to popularly enacted as well as legislatively enacted state measures. Indeed, while the Framers frequently noted the importance of allowing the people to *choose* representatives, they no-

²⁰ As early as July 1780, Washington wrote that, under the Articles of Confederation, "our measures are not under the influence and direction of one council, but thirteen, each of which is actuated by local views and politics[.]" 19 THE WRITINGS OF GEORGE WASHINGTON 132 (John C. Fitzpatrick ed.). Randolph summarized the well-known results of this parochialism at the opening of the Convention. 1 FARRAND 19. Although Wilson suggested that state opposition to federal measures resulted "*more* from the Officers of the States, than from the people at large" (*id.* at 49 (emphasis added)), it was understood that "the problems of the 1780s were . . . due to the legislatures' very representativeness." WOOD at 409-10. As Madison explained, "[t]he necessity of a Genl. Govt. supposes that the State Legislatures will sometimes fail or refuse to consult the common interest [i.e., those of the union] at the expense of their local conveniency or prejudices." 2 FARRAND 240.

where suggested that the people could *disqualify* persons from service in the federal legislature.

3. *Edmund Randolph's Notes From the Committee of Detail Do Not Demonstrate That the Qualifications Prescribed by the Constitution Are Not Exclusive.*

Against this compelling evidence that the Constitution establishes the exclusive qualifications for members of Congress, petitioners ask this Court to place critical weight on language that appears in Edmund Randolph's notes from the Committee of Detail. Formed in late July, this Committee was assigned the task of bringing together in one document the various agreements the delegates had reached during the first two months of debate. 2 FARRAND 95. Randolph's notes, which historians surmise may have been the first draft of the Committee's report,²¹ included the following phrase: "(and any person possessing these [previously recited] qualifications may be elected except)." *Id.* at 139. Claiming that this parenthetical phrase would have rendered the Qualifications Clauses exclusive, petitioners note that the phrase was not included in the Committee's report to the full Convention. From this they conclude that the entire Convention rejected a recitation in the Constitution of exclusive qualifications.

This evidence cannot possibly bear the extraordinary weight petitioners place on it. Most critically, the unexplained actions of the Committee cannot be ascribed to the Convention generally. The evolution of Randolph's notes, and their relationship to drafts prepared by Wilson, is essentially unknown, and there is no record of the five-member Committee's proceedings or the reasons for the numerous changes they made.²² What is clear, however,

²¹ See 1 FARRAND xxiii n.36 (describing the document petitioners cite as "[a]n early, *perhaps* the first, draft of the committee's work") (emphasis added).

²² The most plausible explanation for the deletion is that the Committee thought the parenthetical phrase redundant. At the time, four state constitutions recited exclusive qualifications in the same negative language (WARREN at 422-23 n.1) that appears in

is that the Convention as a whole did not debate or modify any of the Committee's initial or interim drafts, only its final report. Thus, even in the unlikely event that the Committee intended to reject exclusivity,²³ that intention was never conveyed to, let alone approved by, the entire Convention.

In fact, most of the debates over property qualifications and length of U.S. citizenship took place *after* the Committee released its report. Notwithstanding repeated statements and actions revealing the Convention's intention to establish a uniform and exclusive set of qualifications, no member of the Committee so much as hinted that it proposed to resolve the matter differently. Indeed, if the Committee had purposely rendered the qualifications non-exclusive and thereby authorized States to establish additional requirements, Rutledge and Ellsworth would not have proposed leaving property qualifications to the States. Both were members of the Committee of Detail and would have understood that such a delegation would occur as long as the Constitution included no provision on the subject. Their statements and actions reveal plainly that this was not their understanding.

Wilson's first draft of the Committee's report (see 2 FARRAND 153 (showing deletion of the phrase "No person shall be capable of being chosen")), and that was later used in the federal Constitution. Wilson was from one of those states (Pennsylvania), as was the Committee Chairman, John Rutledge (South Carolina). Because the language in the Committee's final report is identical to that in Wilson's first draft (compare *id.* at 153 with *id.* at 178), it is possible that Wilson himself deleted the phrase as superfluous.

²³ Because it is only the *deletion* of the parenthetical phrase that gives rise to the inference petitioners draw, and because no such language was deleted from the clause concerning the Senate, petitioners' argument leads to the implausible conclusion that the qualifications for members of the House are not exclusive, whereas those for Senators are.

B. The Ratification Debates Confirm That States Have No Authority To Limit The Terms Of Members Of Congress.

The extensive debate preceding the ratification of the Constitution is utterly fatal to petitioners' claims. Statements made during the ratifying conventions and in hundreds of letters, newspaper editorials, and pamphlets confirm that opponents and supporters alike understood that the qualifications set forth in the Constitution were exclusive, and could be augmented only through amendment of that document itself.

1. Opponents and Supporters Alike Understood That Rotation Had Been Excluded From the Constitution.

Numerous opponents of ratification identified the lack of a rotation requirement as one of the Constitution's principal defects. Like term limits proponents today, critics argued that rotation was necessary to prevent the growth of a class of politicians who "probably will be continued in office during their lives" and would soon lose touch with the people.²⁴ Nor was this criticism limited to opponents.

²⁴ "Reply to Wilson's Speech: 'An Officer of the Late Continental Army,'" *Independent Gazeteer* (Phil., Nov. 6, 1787) (attributed to William Findley), 1 BAILYN 97, 100; see also Samuel Bryan, "Centinel I," *Independent Gazeteer* (Phil. Oct. 5, 1787), 1 BAILYN 52, 61 ("as there is no exclusion by rotation, [Senators] may be continued for life, which, from their extensive means of influence, would follow of course"); Samuel Bryan, "Centinel II," *Freeman's Journal* (Phil., Oct. 24, 1787), 1 BAILYN 77, 86 (same); Letter of George Lee Turberville to Madison (Dec. 11, 1787), 1 BAILYN 477, 479 ("[w]hy was not that truly republican mode of forcing the Rulers or sovereigns of the states to mix after stated Periods with the people again-observed"); 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 1836) (hereinafter "ELLIOT") (Mass., Turner) ("[k]nowing the numerous arts, that designing men are prone to, to secure their election, and perpetuate themselves, it is my hearty wish that a rotation may be provided for"); *id.* at 62 (Mass., Kingsley) ("we are deprived of annual elections, have no rotation, and cannot recall our members; therefore our federal rulers will be masters and not servants"); Mercy Otis Warren,

In a letter to James Madison, Thomas Jefferson identified as "[t]he second feature I dislike, and greatly dislike, is the abandonment in every instance of the necessity of rotation in office." Letter of Jefferson to Madison (Dec. 20, 1787), 1 BAILYN 209, 211.²⁵

Despite the uncertain prospects of the Constitution in a number of States, supporters never suggested that this "defect" was illusory because States could impose rotation on members of Congress. To the contrary, supporters argued that mandatory rotation abridged the people's right to choose their leaders. In New York (where ratification was perhaps most uncertain), Robert Livingston argued that

[t]he people are the best judges who ought to represent them. To dictate and control them; to tell them who they shall not elect, is to abridge their natural

"A Columbian Patriot" (Boston, Feb. 1788), 2 BAILYN 284, 292 ("[t]here is no provision for a rotation, nor any thing to prevent the perpetuity of office in the same hands for life. . . . By this neglect we lose the advantages of that check to the overbearing insolence of office, which by rendering him ineligible at certain periods, keeps the mind of man in equilibrio, and teaches him the feelings of the governed"); 2 ELLIOT 287-88 (N.Y., G. Livingston) (Senators will enjoy "a security of their re-election, as long as they please. . . . In such a situation, men are apt to forget their dependence, lose their sympathy, and contract selfish habits. . . . The senators will associate only with men of their own class, and thus become strangers to the condition of the common people"); *id.* at 309-10 (N.Y., Smith) ("there is no doubt that the senators will hold their office perpetually; and in this situation, they must of necessity lose their dependence, and attachment to the people").

²⁵ As petitioners note, 30 years later Jefferson changed his views. See Term Limits Br. at 48. In 1787 and 1788, however, no writer shared Jefferson's later view that States could impose a rotation requirement. It is worth noting, too, that, despite his brilliance, Jefferson was very often famously wrong in constitutional matters. He thought, for example, that a national bank was unconstitutional (compare 5 THE WRITINGS OF THOMAS JEFFERSON 284-89 (Paul Leicester Ford ed., 1895) (letter of Jefferson to Washington on the bank's constitutionality) with *McCulloch v. Maryland*, 17 U.S. 316 (1819)) and that he could fire John Marbury. See *Marbury v. Madison*, 5 U.S. 137 (1803).

rights. This rotation is an absurd species of ostracism. . . . We all know that experience is indispensibly necessary to good government. —Shall we then drive experience into obscurity. I repeat, that this is an absolute abridgement of the people's rights.

2 ELLIOT 292-93.

The people themselves, defenders argued, had the right to "recall" or "rotate" their representatives through their franchise. As George Washington wrote:

The power under the Constitution will always be in the People. It is entrusted for certain defined purposes, and for a certain limited period, to representatives of their own choosing; and whenever it is executed contrary to their Interest, or not agreeable to their wishes, their Servants can, and undoubtedly will be, recalled.

Letter of G. Washington to B. Washington (Nov. 10, 1787), 1 BAILYN 305, 306-07. Indeed, while the Arkansas Amendment deplores the fact that elected officials are "preoccupied with reelection," Washington's comments, like dozens of others, reflect the Framers' belief that the desire for re-election ensures that representatives will remain responsive to their constituents. See, e.g., THE FEDERALIST No. 57, at 352 (James Madison) (frequent elections "support in the members [of the House] an habitual recollection of their dependence on the people"). And while petitioners contend that the Framers expected members of Congress to limit their terms voluntarily (see State Br. at 18-19; Term Limits Br. at 40), the Framers cited the possibility of re-election and extended tenure as a benefit. Wilson argued that "the people at large will acquire an additional privilege in *returning* members to the house of representatives" ("James Wilson's Speech at a Public Meeting," (Phil. Oct. 6, 1787), 1 BAILYN 63, 67 (emphasis added)), and Madison argued that foreign policy would be more secure under the Constitution because "the same members [of the Senate] are re-eligible from time to time, [and] the danger from a change [in their membership] may possibly not happen during the lives of the

members." Letter of Madison to G. Nicholas (May 17, 1788), 2 BAILYN 443, 446.²⁶

Most tellingly, opponents who found these answers unsatisfactory recognized that their only recourse was to amend the Constitution itself. At the New York ratifying convention, Gilbert Livingston proposed an amendment that would have prevented individuals from serving two consecutive terms in the Senate. 2 ELLIOT 289. Debate over the proposal reveals that proponents and opponents shared two basic assumptions: the amendment would add a new qualification to those prescribed in the Constitution, and such an addition required an amendment of the Constitution.

Melancton Smith, a principal term limit proponent, defended the amendment on the ground that it constituted no greater an abridgement of the right to vote than the qualifications of Article 1. "What is the whole system of qualifications," he argued, "but a restraint? Why is a certain age made necessary? [W]hy a certain term of citizenship?" *Id.* at 311. And, even though the amendment concerned Senators, who were appointed by the State legislatures, no one suggested that the States had any inherent authority to impose such a restraint on their own. Hamilton observed that "[t]here is no probability that we shall ever persuade a majority of the states to agree to this amendment." *Id.* at 320. Accepting the necessity of such persuasion, Smith simply responded that such an endeavor might not be as difficult as Hamilton supposed. *Id.* at 323-24.

These same assumptions were reflected in other ratifying conventions. In Virginia, delegates "recommended to

²⁶ Madison also recognized that long-term incumbency might entail certain dangers, but he did not suggest that the States could unilaterally remedy them. In THE FEDERALIST No. 53, he noted that "[a] few of the members [of the House], as happens in all such assemblies, will possess superior talents; will, by frequent re-elections, become members of long standing; will be thoroughly masters of the public business, and perhaps not unwilling to avail themselves of those advantages." *Id.* at 335.

the consideration of the Congress which shall first assemble" (2 BAILYN 558), various amendments, one of which was that members of the House and Senate "should at fixed periods be reduced to a private station, [and] return into the mass of the people." See App. 9a. The North Carolina convention attached an identical rotation amendment (App. 10a), and Pennsylvania proposed an amendment allowing state legislatures to recall Senators at any time. 2 ELLIOT 545.

Only by turning a blind eye to this history can petitioners make the remarkable assertion that no opponent of the Constitution "suggested that the States were being denied the power to set qualifications." Term Limits Br. at 42. Those on both sides of the ratification debates plainly understood that the Constitution barred States from adding a rotation requirement, and that such a qualification could only be added by constitutional amendment.

2. *The Ratification Debates Reflect a Universal Understanding That the Qualifications Prescribed by the Constitution Were Exclusive.*

The ratification debates also disclose a universal understanding that the qualifications prescribed by the Constitution were exclusive and that, as a result, the door to congressional office had purposely been left open to virtually all.

Numerous writers applauded the absence of a property qualification. Noah Webster wrote approvingly that "money is not made a requisite—the places of senators are wisely left open to *all* persons of suitable age and merit." N. Webster, "A Citizen of America," (Phil., Oct. 17, 1787), 1 BAILYN 129, 142 (emphasis added). Timothy Pickering, who later served in both the House and Senate, noted that, "while several of the state constitutions prescribe certain degrees of property as indispensable qualifications for offices, this which is proposed for the U.S. throws the door wide open for the entrance of *every* man who enjoys the confidence of his fellow citizens." Letter of T. Pickering to C. Tillinghast (Dec.

24, 1787), 1 BAILYN 289, 290 (emphasis in original). And, in a passage that described his own ascent from impecunious origins, Hamilton wrote that "[t]here are strong minds in every walk of life that will rise superior to the disadvantages of situation, and will command the tribute due to their merit, not only from the classes to which they particularly belong, but from the society in general. *The door ought to be equally open to all.*" THE FEDERALIST No. 36, at 217 (emphasis added).

Seeking to win ratification in closely divided New York, defenders emphasized that the absence of other qualifications was intentional and beneficial. "No Government[] that has ever yet existed," John Stevens, Jr., wrote in December 1787, "affords so ample a field, to individuals of all ranks, for the display of political talents and abilities. . . . No man who has real merit, let his situation be what it will, need despair." J. Stevens, Jr., "Americanus V," *Daily Advertiser* (New York, Dec. 12, 1787), 1 BAILYN 487, 492. In THE FEDERALIST No. 52, Madison wrote that the qualifications of legislators "have been very properly considered and regulated by the convention." *Id.* at 326. Reciting the qualifications set forth in Article I, he explained that, "[u]nder these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith." *Id.* Less than two weeks later, he made clear that additional qualifications could not be added:

Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, or religious faith, or of civil profession, is *permitted* to fetter the judgment or disappoint the inclination of the people.

THE FEDERALIST No. 57, at 351 (emphasis added). And during the debates at the New York convention, Hamilton emphasized that "the true principle of a republic

is, that the people should choose whom they please to govern them." 2 ELLIOT 257.

Delegates at other ratifying conventions likewise recognized that the Constitution prescribed exclusive qualifications. The Massachusetts convention rejected an attempt to add a property qualification after Rufus King, a delegate to the Constitutional Convention, explained that such a measure had been considered and rejected by the drafters. *Id.* at 35-36. In Virginia, Wilson Carey Nicholas refuted charges that the Constitution violated democratic principles: "very few should be excluded from the right of being chosen to the legislature. This Constitution has amply attended to this idea. We find no qualifications required except those of age and residence." 3 ELLIOT 8.

Once again, petitioners simply ignore this evidence. Instead, they focus on Hamilton's famous statement that "[t]he qualifications of the persons who may choose or be chosen . . . are defined and fixed in the Constitution, and are unalterable by the legislature." THE FEDERALIST No. 60, at 371. According to petitioners, because Hamilton referred only to Congress, he necessarily implied that *state* legislatures could add whatever qualifications they wished. State Br. at 45; Term Limits Br. at 43-44.

Petitioners' assertion, however, cannot be reconciled with Hamilton's earlier statement—echoed or presaged by numerous other defenders of the Constitution—that the door to congressional office had been left open to all who possessed the minimal qualifications. It is simply inconceivable that any of these writers thought this important principle—safeguarded from congressional interference—was nevertheless subject to veto or complete subversion by the 13 state legislatures, and no opponent of the Constitution suggested otherwise.

C. The Actions Of The Early Congresses Reflect A Recognition That Additional Qualifications Could Be Imposed Only By Amending The Constitution.

1. *The First Congresses Sought to Add Qualifications Through Constitutional Amendment.*

In a remarkable distortion of the historical record, the State attempts to prove that the Constitution's qualifications are not exclusive by pointing to the fact that "mandatory rotation proposals were advanced shortly after the First Congress convened." State Br. at 22. The State fails to disclose the most salient feature of these proposals: they were proposed *constitutional amendments*, not statutes.²⁷ Indeed, these proposed amendments were followed by four others introduced in the Second, Ninth, Tenth and Twenty-Fourth Congresses. 3 ANNALS OF CONG. 663 (Gales and Seaton eds., 1793) (officers and stockholders of the Bank of the United States to be ineligible for congressional office); 15 ANNALS OF CONG. 880-92 (Gales and Seaton eds., 1806) (government contractors ineligible); 18 ANNALS OF CONG. 1714-18 (Gales and Seaton eds., 1808) (same); CONG. GLOBE, 24th Cong., 1st Sess. 165 (1836) (same). Like the state ratifying conventions, the earliest Congresses plainly understood that additional qualifications could be imposed only through amendment of the Constitution itself, not by legislative fiat.

The four statutes Congress passed between 1789 and 1792 are consistent with this understanding. As petitioners note, all four disqualified offenders from holding

²⁷ Rep. Tucker proposed that the following words be added to the end of Article I, Section 2, Clause 2: "'[n]or shall any person be capable of serving as a Representative more than six years in any term of eight years'"; and that the following be added to the end of Article I, Section 2, Clause 3: "'[f]rom and after commencement of the year 1795, the election of Senators for each State shall be annual, and no person shall be capable of serving as Senator more than five years in any term of six years.'" 1 ANNALS OF CONG. 761 (Joseph Gales ed., 1789).

"any office under the United States" or "any office of honour, trust or profit under the government of the United States."²⁸ What petitioners fail to mention, however, is that this disqualification did *not* extend to *congressional* office. Construing identical language used in one of the Reconstruction era statutes petitioners cite to prove that Congress may add qualifications, this Court ruled in *Burton v. United States* that this language does *not* require a convicted Senator to vacate his seat (202 U.S. 344, 369-70 (1906)), and thereby rejected the argument that the act "superadds disqualifications to those expressly contained in the Constitution." *Id.* at 351.²⁹ Nor do petitioners attempt to reconcile their reading of these statutes with their own recognition—and, more importantly, this Court's holding in *Powell v. McCormack*—that Congress lacks the authority to add qualifications to those enumerated in the Constitution. See Term Limits Br. at 44; State Br. at 45.

²⁸ See Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 67; Act of May 8, 1792, ch. 37, § 12, 1 Stat. 281; Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 117; Act of Dec. 31, 1792, ch. 1, § 26, 1 Stat. 298. This language appears in all but two of the twenty-six later federal statutes petitioners cite. See Term Limits App. 25a-42a. The two provisions that refer to "a position in the Government of the United States" are from the Civil Service laws (Title 5) and plainly refer to civil service positions in the federal government.

²⁹ Although petitioners disparage the Court's reasoning (Term Limits Br. at 32 n.49), the distinction the Court drew between Members of Congress and "person[s] holding office under the United States" is confirmed by the Constitution itself (see art. I, § 6, cl. 2; art. II, § 1, cl. 2) as well as by the statutes petitioners cite. See Act of July 16, 1862, ch. 180, 12 Stat. 577-78 (referring to "any member of Congress or any officer of the government of the United States" convicted) (emphasis added). In all events, the *Burton* Court's determination that the disqualification does not include congressional office has never been disturbed and no court has construed the statutes in which this language appears to disqualify persons from congressional office.

2. *The Maryland Election Debates Reveal That Congress Deemed State-Imposed Qualifications to Be Constitutionally Impermissible.*

The recognition of the early Congresses that the Constitution establishes exclusive qualifications is likewise reflected in the House of Representatives' disposition of an 1806 election dispute resulting from William McCreery's failure to satisfy Maryland's district residency requirement. Ignoring the factual dispute over McCreery's actual place of residence, the House Committee of Elections reported that it had "proceeded to examine the Constitution, and [found] that qualifications of members are therein determined, without reserving any authority to the State Legislatures to change, add to, or diminish those qualifications." 17 ANNALS OF CONG. 871 (Gales and Seaton eds., 1807). The Committee Report concluded that Maryland's additional residency requirement "is contrary to the Constitution of the United States" and resolved that Representative McCreery should be seated.³⁰

Before the House Committee of the Whole, the Chairman of the Elections Committee explained that "[t]he Committee of Elections considered the qualifications of members to have been unalterably determined by the Federal Convention, unless changed by an authority equal to that which framed the Constitution at first; that neither the State nor the Federal Legislatures are vested with authority to add to those qualifications, so as to change them." *Id.* at 872. After extensive debate in which members on the losing side offered the same reasons presented

³⁰ Petitioners' reliance on early State laws that purported to add district residency requirements (see Term Limits App. 12a-18a) is thus misplaced, inasmuch as the first of these to be challenged was deemed invalid. Indeed, within a few years thereafter, both North Carolina and Virginia repealed their district residency requirements. See 1812 N.C. Laws, ch. 6; 1813 Va. Act, ch. 23. Moreover, it is only the actions of the First Congress, not those of early state legislatures, that provide "weighty evidence" of the Constitution's meaning. *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888).

by petitioners here, the Committee of the Whole voted to seat Representative McCreery. There is no question that the House Committee made its decision on constitutional grounds. While that Committee is not an Article III court, its decision was reviewed and relied upon by this Court in *Powell v. McCormack*.³¹

III. THIS COURT'S PRECEDENTS CONFIRM THAT THE QUALIFICATIONS PRESCRIBED BY THE CONSTITUTION ARE EXCLUSIVE.

Finally, this Court's precedents confirm what the language, structure and history of Article I make clear. In *Powell*, this Court addressed whether courts could review a House determination that an individual was "unqualified" to sit as a member because he had been accused of misappropriating public funds and abusing the process of the New York courts." *Nixon v. United States*, 113 S. Ct. 732, 739 (1993) (quoting *Powell*, 395 U.S. at 519). The issue of justiciability in *Powell* thus turned on whether the Constitution's specified qualifications for members are exclusive, or whether they constitute a mere baseline to which other qualifications may be added. In holding that Congress' power under Article I, Section 5 allowed it "to judge only the qualifications expressly set forth in the Constitution" (395 U.S. at 548 n.34), *Powell* established that the only qualifications and disqualifications for membership in Congress are to be found in the Constitution, and that even a constitutional grant of authority to judge qualifications did not include the power to add any.

The Court recently affirmed this reading of *Powell* in *Nixon v. United States*. Distinguishing the justiciability of congressional action under the impeachment clause

³¹ Petitioners correctly observe that the resolution ultimately adopted by the House was simply to seat Rep. McCreery. State Br. at 47; 17 ANNALS OF CONG. 1061 (Gales and Seaton eds., 1807). It is obvious from the debates, however, that opponents of McCreery had lost the constitutional debate in the full House and, for this reason, forestalled a vote on it. See *id.* at 942 (statement of Rep. Randolph).

from congressional action under Section 5, the Court explained that "[o]ur conclusion in *Powell* was based on the *fixed* meaning of 'qualifications' set forth in Article I, Section 2. The claim [of] . . . textual commitment of unreviewable authority was defeated by the existence of this separate provision specifying the *only* qualifications which might be imposed for House membership." 113 S. Ct. at 740 (emphases added).

Petitioners attempt to dismiss *Powell* on the ground that it did not explicitly address whether qualifications can be added either through legislation (Term Limits Br. at 44) or by the States. *Id.*; State Br. at 45. These distinctions are unavailing. First, petitioners fail to recognize that Congress's authority under Section 5 is, if anything, broader than any "reserved" or implied power it or the States could possibly have over the composition of the national legislature. Section 5 is the *only* provision in the Constitution that delegates any authority at all to any entity concerning the qualifications of federal legislators. If the express grant of authority to judge the qualifications of Members of Congress does not include authority to prescribe qualifications, the States (and Congress) cannot derive greater authority from constitutional silence.

Second, Article I, Section 4 makes clear that Congress can enjoy no less authority than the States in this area. Under this provision, Congress is effectively empowered to sit as the legislature of individual States for the purpose of making or altering state election laws. Again, if, as petitioners acknowledge, Congress has no power to add qualifications through its own legislation, the States cannot possess such authority either. To hold otherwise would be to conclude that the Framers conferred through a veto right over state elections laws a power to add qualifications that they did not confer through an express constitutional grant of authority to judge qualifications. In sum, the reasoning in *Nixon* and the holding in *Powell* directly support the Arkansas Supreme Court's determination that Amendment 73 is unconstitutional.

IV. THE ARKANSAS TERM LIMITATION AMENDMENT ESTABLISHES AN UNCONSTITUTIONAL ADDITIONAL QUALIFICATION FOR MEMBERS OF CONGRESS.

Petitioners concede, as they must, that explicit term limitations, such as those enacted by some other States, impose additional qualifications on members of Congress.³² Such initiatives are unconstitutional because they establish qualifications beyond the exclusive ones set forth in the Constitution itself. Although Arkansas Amendment 73 was indisputably enacted to establish term limits for members of Arkansas' congressional delegation, petitioners claim the Amendment is constitutionally permissible because it seeks to achieve its objectives by excluding incumbents from the ballot. Adoption of petitioners' premise that excluding persons from the ballot based on prior service is not an unconstitutional term limitation leads to absurd results. States would be free to impose a host of barriers to service in Congress—including requirements the Framers explicitly considered and rejected—as long as a write-in mechanism preserves the theoretical possibility that a person subject to the limitation might win an election. This contrived approach to the Constitution's prescription of qualifications completely subverts the important democratic principles the Framers so carefully enshrined, and is fundamentally at odds with all of the textual and historical evidence demonstrating that the regulation of legislative qualifications is committed exclusively to Article I itself.

³² Explicit term limitations meet even petitioners' proposed definition of "qualifications," see *infra* at 42, because they would exclude from office individuals who won elections but did not possess the qualification based upon prior service.

A. Under Article I, The Constitutional Validity Of Amendment 73 Depends Upon Its Purposes And Effect.

1. The Purpose and Effect of Amendment 73 Confirm That It Is an Impermissible Qualification for Membership in the National Legislature.

This Court and others consistently have judged the propriety of state laws affecting election outcomes by examining their purpose and effect. In fact, every lower federal and state court that has ever confronted state requirements that explicitly disqualified a class of individuals from serving in Congress has struck them down as unconstitutional. Thus, courts uniformly have invalidated felony disqualifications,³³ district residency requirements,³⁴ and similar requirements.³⁵ The courts' reasoning in strik-

³³ See *Danielson v. Fitzsimmons*, 44 N.W.2d 484 (Minn. 1950); *State ex rel. Eaton v. Schmahl*, 167 N.W. 481 (Minn. 1918); *Application of Ferguson*, 294 N.Y.S.2d 174, 175-76 (N.Y. Sup. Ct.), *aff'd*, 294 N.Y.S.2d 989 (N.Y. App. Div. 1968).

³⁴ See *Exon v. Tiemann*, 279 F. Supp. 609, 613 (D. Neb. 1968); *State ex. rel. Chavez v. Evans*, 446 P.2d 445, 448 (N.M. 1968); *Hellmann v. Collier*, 141 A.2d 908, 911-12 (Md. 1958).

³⁵ See *Dillon v. Fiorina*, 340 F. Supp. 729, 731 (D.N.M. 1972) (two-year state residency requirement); *Shub v. Simpson*, 76 A.2d 332, 340-341 (Md. 1950) (disqualification of subversive persons); *In re O'Connor*, 17 N.Y.S.2d 758, 759-60 (1940) (disqualification of Communists). Although decisions that resign-to-run statutes are invalid under the Qualifications Clauses may no longer be good law in light of more recent authority (compare *State ex. rel. Johnson v. Crane*, 197 P.2d 864 (Wyo. 1948); *Stockton v. McFarland*, 106 P.2d 328, 329-31 (Ariz. 1940); and *State ex. rel. Chandler v. Howell*, 175 P. 569, 570 (Wash. 1918) with *Joyner v. Mofford*, 706 F.2d 1523 (9th Cir.), *cert. denied*, 464 U.S. 1002 (1983); *Signorelli v. Evans*, 637 F.2d 853 (2d Cir. 1980); cf. *Clements v. Fashing*, 457 U.S. 957 (1982) (rejecting First Amendment challenge to resign-to-run provision)), the fact remains that every court to consider the question has concluded that States may not impose additional qualifications for membership in Congress. The recent resign-to-run decisions do not disagree with that principle, but have instead concluded that such laws regulate the integrity of state offices rather than impose qualifications for congressional office.

ing down such provisions has been uniform: States are precluded from adding to the requirements listed in the Qualifications Clauses.³⁶

Beyond dispute, the purpose and effect of all of these requirements was to do exactly what the plain language of Amendment 73 says it does: render certain individuals ineligible to serve in Congress. None could be justified as a procedural regulation designed to ensure the integrity of the election process or to facilitate voter choice. Accordingly, because the purpose of these provisions was to exclude a class of individuals from serving in Congress, the provisions were invalidated.³⁷

It is likewise clear that Arkansas Amendment 73 imposes an unconstitutional additional qualification. The Amendment's title is "The Arkansas Term Limitation Amendment." Its preamble states that:

The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Ar-

³⁶ The suggestion that this entire line of cases can be dismissed because the decisions "offer[] little analysis" (Term Limits Br. at 29 n.44) is inaccurate. Some courts analyzed the issue at great length. See, e.g., *Crane*, 197 P.2d at 867-74; *McFarland*, 106 P.2d at 329-31. Those that did not stated that the issue was "well settled" (*Fiorina*, 340 F. Supp. at 731), or noted that "[a]ll authorities . . . [were] in accord." *Fitzsimmons*, 44 N.W.2d at 486. Respondent is aware of no decision—and petitioners cite none—holding that States are permitted to create additional qualifications for members of Congress.

³⁷ This consistent line of cases belies the State's argument that its proposed definition of the term "qualification" is the only judicially manageable one. State Br. at 29. Courts have never had any trouble identifying additional qualifications that are incompatible with the Framers' intent. In any event, gains in efficiency obtained through loss of constitutional values is a plainly unacceptable method of constitutional analysis.

kansas, exercising their reserved powers, herein *limit the terms of elected officials*.

Pet. App. 3a-4a. (emphasis added). The preamble does not refer to any state interest related to the integrity of the election process or that has been recognized by any court as promoting a candidate-neutral state interest. Rather, the avowed purpose of the Amendment is to manipulate election outcomes and to disqualify individuals with prior service from serving in the national legislature.

In contending otherwise, petitioners claim the Amendment is designed to serve a permissible state interest in leveling the playing field among congressional candidates. Term Limits Br. at 19-25; State Br. at 26-27. But this suggested purpose cannot be found in the preamble or elsewhere, and was not acknowledged by the Arkansas courts. To the contrary, the preamble states that the Amendment is designed not to level the electoral playing field, but to exclude incumbents from the stadium. Amendment 73 does not protect the integrity and fairness of the election process in a candidate-neutral way. The only rational purpose of Amendment 73 is to ensure that incumbents never—or almost never—win.

Even if its purpose were not so clear, the findings of the Arkansas courts eliminate any doubt as to the law's intent. See Pet. App. 15a ("[t]he intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service"); Pet. App. 49a ("[the Term Limitation] Amendment is purely and simply a restriction on the qualifications of a person seeking federal congressional office"). State court interpretations of state law are binding on this Court,³⁸ particularly where a state

³⁸ *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 339 (1986); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965). None of the narrow exceptions to this rule is applicable here. See *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984) (rule is inapplicable when a state court's interpre-

court's determination is *adverse* to the State's interest in having its laws upheld as constitutional. *E.g.*, *Reitman v. Mulkey*, 387 U.S. 369, 373-74 (1967). Moreover, it has long been the practice of this Court to defer to state court determinations of the intent of the state legislature,³⁹ and the logic of this rule applies equally to state court determinations concerning the purpose of state constitutional amendments. Because both state courts held that Amendment 73 is a term limits law, its status as such a law cannot be questioned before this Court.

Not only is the avowed purpose of Amendment 73 to dictate election outcomes, that will be its effect as well. As the Arkansas Supreme Court found, the Amendment effectively disqualifies individuals with prior service from congressional office because the possibility of winning reelection as a write-in candidate in Arkansas is a mere "glimmer[] of opportunity." Pet. App. 15a. This state court finding of fact is not reviewable. See, *e.g.*, *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952); *Grayson v. Harris*, 267 U.S. 352, 358 (1925); *Portland Ry., Light & Power Co. v. Railroad Comm'n*, 229 U.S. 397, 441 (1913).⁴⁰

tation "has been influenced by an accompanying interpretation of federal law"); *Missouri ex rel. Wabash Ry. v. Public Serv. Comm'n*, 273 U.S. 126, 131 (1927) (the Supreme Court may consider "questions of state law arising after the decision below" was rendered).

³⁹ See, *e.g.*, *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 360 U.S. 684, 688 (1959); *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924) ("[t]he task of determining the intention of the state legislature . . . like the usual function of interpreting a state statute, rests primarily upon the state court"); *Schneider Granite Co. v. Gast Realty & Inv. Co.*, 245 U.S. 288, 290 (1917).

⁴⁰ Petitioners claim this rule of deference is inapplicable here because the ruling below "[l]ack[ed] any evidentiary foundation," and is thus "one of law." Term Limits Br. at 18 n.22. But the state courts had before them an affidavit from Rep. Thornton concerning the impact exclusion from the ballot would have on incumbent candidates, and the Arkansas Supreme Court referenced as well the record in *Thorsted v. Gregoire*, 841 F. Supp. 1068 (D.

In any event, petitioners' assertion that the Arkansas Supreme Court's conclusion is "contrary to the record and historically incorrect"⁴¹ (Term Limits Br. at 18) is meritless. This Court has acknowledged that a write-in opportunity "is not an adequate substitute for having the candidate's name appear on the printed ballot" (*Anderson v. Celebrezze*, 460 U.S. 780, 799 n.26 (1983)), and that "'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot." *Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974). In fact, only five write-in candidates have ever been elected to Congress. Out of approximately 1,300 Senatorial elections since passage of the 17th Amendment in 1913, only one Senator, Strom Thurmond in 1954, has been elected as a write-in candidate.⁴² There have been approximately 32,400 elections to the House of Representatives since the founding of Congress, and approximately 20,000 during this century, when pre-printed ballots came into use, yet only four Representatives have ever been elected as write-ins, none of whom was an incumbent.

This glimmer of opportunity becomes chimerical upon examination of the facts behind the five successful write-in campaigns. Three of the five—Senator Thurmond in 1954, Representative Joseph Skeen in 1980, and Representative Charles F. Curry, Jr. in 1930—won only after

Wash. 1994), and they concluded that, even with the write-in option, the effect of the Amendment is to preclude incumbents from serving in Congress.

⁴¹ This assertion reveals an irreconcilable tension in petitioners' position. Conceding that the purpose of Amendment 73 is to prevent incumbents from staying in office, they contend that most well-known incumbents will often be successful getting re-elected via the write-in option. Term Limits Br. at 18 (citing affidavit of a political scientist). This attempt to justify the Amendment on the ground that it will not accomplish its stated purposes suggests that the supporters of the Amendment do not truly view the write-in option as a viable way for incumbents to get re-elected.

⁴² These figures are derived from the United States Bureau of the Census, *Statistical Abstract of the United States* 275 (113th ed. 1993).

frontrunners died late in the race. Representative Packard conducted a successful write-in campaign in 1982 after coming in second in an 18-candidate Republican primary brawl in which the victor was widely accused of improper tactics. The successful write-in campaign took place in 1958 in Arkansas in the midst of the State's heated battle over public school desegregation. Dale Alford, a member of the Little Rock School Board who opposed integration, entered the race just one week before the election as a write-in candidate. He defeated eight-term Congressman Brooks Hays, who advocated gradual integration of the schools and had tried to mediate the conflict between the Governor and the federal government. In the absence of the unusual circumstances of these elections, no write-in candidate has ever been elected to Congress in this country.

In light of this history, the Arkansas Supreme Court correctly concluded that the availability of the write-in option does not alter the nature of the Amendment, which is to preclude individuals with a certain amount of prior service from serving in Congress.⁴³

2. *Petitioners' Attempt to Define "Qualifications" Without Regard to Their Purpose and Effect Should Be Rejected.*

Recognizing that Amendment 73 cannot survive scrutiny under the foregoing analysis, petitioners propose another test. They contend that a requirement for congressional office is not an additional qualification if it does not exclude a candidate who captures a majority of the vote. Term Limits Br. at 16; State Br. at 30-31. This definition, however, is a mere contrivance that is funda-

⁴³ Petitioners also note that the Arkansas Supreme Court had before it an affidavit from a political scientist who opined that it is "far from impossible" for a write-in candidate to win. J.A. 201-04; Term Limits Br. at 18. The Arkansas Supreme Court obviously did not credit the affidavit, presumably because it contains sweeping statements about voter behavior and write-in candidacies, without any reference to studies or research conducted by the affiant or anyone else.

mentally incompatible with the central democratic principles embodied in the Constitution's prescription of a minimal, and exclusive, set of qualifications.

According to petitioners, as long as a State provides for write-in candidacies, the Constitution's prescription of qualifications is entirely irrelevant to the validity of state laws that exclude from the ballot persons between the ages of 35 and 40; persons who have not been citizens of the United States for at least ten years; foreign-born candidates; persons who do not meet solvency or property ownership tests; or persons not born within the State or who have not served in its legislature. Each requirement, like Amendment 73 itself, clearly undermines the wording and structure of Article I because, after vigorous debate, the Framers deliberately chose the precise age and citizenship requirements embodied in Article I, Sections 2 and 3; explicitly refused to adopt qualifications based upon property ownership, solvency and prior length of service; and made clear their commitment to uniform requirements. See *supra* at 13-19; see also 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 629 (4th ed. 1833) (if the States were to prescribe that a Representative should be forty years of age, and a citizen for 10 years, "the very qualification fixed by the Constitution [would be] completely evaded and indirectly abolished"). Yet, under petitioners' definition, none of these requirements is a qualification because none excludes from office any candidate who nevertheless manages to win the majority of the votes cast.

The text, structure and history of Article I cannot so easily be cast aside. Writing a century before the use of pre-printed ballots, the Framers could not have anticipated ballot access requirements. Nevertheless, in creating a new national legislature and prescribing the qualifications for its members, the Framers made unquestionably clear their commitment to two democratic principles: (1) the people should have an unfettered choice of who represents them, and (2) the door to the national legislature should be open to all who possess a few essential qualifi-

cations. Whether or not petitioners' definition of a "qualification" comports with 18th century dictionary definitions (see State Br. at 28 n.37), it makes a mockery of these principles, allowing them to be subverted through the transparent artifice of ballot exclusion.⁴⁴ Because the Constitution is to be read, "not as [a] . . . legislative code[] . . . , but as the revelation of the great purposes which were intended to be achieved by . . . a continuing instrument of government" (*United States v. Classic*, 313 U.S. 299, 316 (1941)), petitioners' proposed definition of the term "qualification" should be rejected.⁴⁵

B. States Have No Authority Under Article I, Section 4 To Exclude Candidates From The Ballot Based On Prior Congressional Experience.

1. *The Times, Places and Manner Clause Was Never Intended to Permit States to Dictate Election Results.*

Even if Amendment 73 is not an additional qualification—and respondent believes it plainly is—it is a measure that States have no authority under the Times, Places, and Manner Clause to enact. Petitioners' contention that

⁴⁴ The fact that some of these restrictions might also violate the First or Fourteenth Amendments is irrelevant. At the time they drafted the qualifications set forth in the Constitution, these amendments did not exist, and the Framers thus could not have entrusted the protection of the people's right of choice to these safeguards.

⁴⁵ Contrary to petitioners' suggestion, the courts in *Joyner v. Mofford*, 706 F.2d 1523 (9th Cir.), cert. denied, 464 U.S. 1002 (1983), and *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821 (N.D. Ga.), aff'd, 992 F.2d 1548 (11th Cir. 1993), did not base their decisions on petitioners' proposed test. Only the First Circuit, in *Hopmann v. Connolly*, 746 F.2d 97, 103 (1st Cir. 1984), vacated in part on other grounds, 471 U.S. 459 (1985), has purported to apply the test. Even in that case, however, the test was unnecessary because the law was a classic ballot access regulation that permitted only persons who received 15 percent of the vote on a state nominating convention ballot to run in a state primary. It is far from clear that the court would use this test to judge the propriety of a requirement explicitly designed "to limit the terms of elected officials."

this Clause empowers the States to "level the playing field" in order to equalize candidates' chances of electoral success is wholly contrary to the intent of the Framers.

In creating the national legislature, the Framers delegated to the States carefully circumscribed authority to perform necessarily local election functions. In describing this authority, no delegate mentioned that States might set additional qualifications or disable candidates from office. Madison referred instead to the latitude States had to decide

[w]hether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place, shd all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points would depend on the Legislatures.

2 FARRAND 240-41. It was these *procedural* regulations that he feared State Legislatures would "mould . . . as to favor the candidates they wished to succeed." *Id.* at 241; see also *id.* (G. Morris) (worrying that the "States might make false returns and then make no provisions for new elections").

Moreover, as petitioners note, Article I, Section 4 was "extremely controversial" during the ratification debates. Numerous critics vehemently denounced it, echoing Luther Martin's claim that it was "designed for[] the utter extinction and abolition of all state governments." 1 ELLIOT 361-62.⁴⁶ No fewer than seven state ratifying conventions passed resolutions asking the first Congress to amend the provision or forswear its use. See App. 2a-8a.

Plainly, opponents did not view this provision as a font of state authority to change or add to the qualifications set forth in the Constitution. Indeed, although it was the subject of extensive debate, petitioners do not cite a single instance in which anyone claimed that the

⁴⁶ See also 1 BAILYN 60, 100, 160, 236, 260-61, 428-29, 713, 896, 901, 927, 944.

provision authorized States to alter or add qualifications for congressional office. Nor did supporters, in attempting to placate the opposition, suggest otherwise. As the *Connecticut Courant* explained in 1788:

The state Legislatures are to make the regulations and arrangements for the choice, and to make the privilege still more secure, these regulations are subject to the revision of the general Legislature. The constitution expressly provides that the choice shall be by the people, which cuts off both from the general and state Legislatures the power of so regulating the mode of election, as to deprive the people of a fair choice.

"The Republican," *Connecticut Courant* (Hartford, Jan. 7, 1788), 1 BAILYN 710, 713 (emphasis added).

Petitioners' limitless "level the playing field" rationale would have been unimaginable to the Framers. Under petitioners' theory, States can conclude that not only incumbency but unusual charisma, public speaking skills, fame derived from careers in the sports or entertainment fields, or great personal wealth should be counterbalanced. Similarly, States could adopt measures to handicap incumbents or candidates who are perceived to enjoy undue advantages by requiring that they win two-thirds or three-fourths of the votes cast.

Such interference would fly in the face of the Framers' conception of the limited power States were granted to regulate elections. And, because this provision empowers Congress to "make or alter" state election laws, petitioners' sweeping rationale would permit precisely the type of congressional manipulation of elections that Madison and Hamilton demonstrated was placed beyond Congress's authority by the Constitution's prescription of fixed legislative qualifications. Because States enjoy no greater authority under Article I, Section 4 than Congress, the demonstration Hamilton and Madison made is equally fatal to the sweeping state authority petitioners purport to derive from this same provision, particularly where

the authority claimed would thwart Article I's comprehensive design.

2. *Nothing in This Court's Ballot Access Decisions Suggests That States Have Authority to Dictate the Outcome of Federal Elections.*

This Court's decisions construing the Times, Places and Manner Clause are entirely faithful to this history. This Court has held that States may adopt "requirements as to *procedure* and *safeguards* which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (emphasis added). Contrary to petitioners' suggestion, the fundamental right is *not* the right to be governed by whomever the State, or anyone else, deems most "responsible and responsive." State Br. at 32. It is the right of the voter to vote for whomever he or she pleases. Accordingly, this Court has never suggested that States can deliberately manipulate the electoral chances of a particular group or class of candidates, much less handicap candidates on the ground that voters are too *likely* to re-elect them.⁴⁷

Consistent with the States' purely procedural role under the Times, Places and Manner Clause, this Court has held that States may enact "generally applicable and even-handed restrictions that protect the integrity and reliability of the electoral process itself." *Anderson v. Cele-*

⁴⁷ Petitioner's reliance on this Court's reapportionment decisions (Term Limits Br. at 23-25) is entirely misplaced. This Court has held that States may create congressional districts that are "aimed at maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation have achieved." *White v. Weiser*, 412 U.S. 783, 791 (1973). Term limitations, in stark contrast, *sever* relationships between congressmen and constituents who would like to re-elect them and destroy seniority. Far from demonstrating that States may counterbalance the advantages of incumbency, these cases indicate that States cannot interfere with incumbents' chances of winning elections because this interference is detrimental to voter choice.

brezze, 460 U.S. 780, 788 n.9 (1983). Thus, States may "require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates." *Id.* at 788-89 n.9.⁴⁸ States may also protect the integrity of various routes to the ballot, by, for example, forcing candidates to make a binding choice from among those routes by a date certain, because such requirements prevent behavior that is unfair and that can yield results inconsistent with voter preferences. This Court's decision in *Storer v. Brown*, 415 U.S. 724 (1974), upon which petitioners place such heavy reliance, is an example of such an even-handed "affiliation" requirement.⁴⁹ Finally, States may require persons holding specified state and county offices to resign automatically if they run for congressional office, not because States can dictate election outcomes, but because they have a legitimate interest in controlling the conduct of their own employees and preventing corruption. *Cf. Clements v. Fashing*, 457 U.S. 957 (1982) (upholding a resign-to-run provision against First Amendment and Equal Protection challenges on the ground that States may legitimately regulate the conduct of state officeholders).⁵⁰

⁴⁸ See, e.g., *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (upholding requirement that minor-party candidate receive at least 1% of the primary vote in order to appear on the general election ballot); *American Party v. White*, 415 U.S. 767 (1974) (upholding Texas scheme providing four methods for candidates to be placed on the general election ballot); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (upholding requirement that nonparty candidates file nominating petitions signed by five percent of eligible voters).

⁴⁹ See also *Rosario v. Rockefeller*, 410 U.S. 752, 760-61 (1973) (upholding requirement that voter enroll with party of his choice 30 days before general election in order to vote in next primary because purpose of the requirement is to prevent disruptive party raiding).

⁵⁰ See also *Joyner v. Mofford*, 706 F.2d 1523, 1528 (9th Cir.), cert. denied, 464 U.S. 1002 (1983) ("[t]he burden on candidacy, imposed by [resign-to-run provisions], is indirect and attributable to

The authority the State seeks to exercise in this case goes far beyond any this Court has recognized in its ballot access decisions. Amendment 73 does not prevent voter confusion or otherwise ensure the integrity or efficiency of the election process; it does not prevent manipulation of the various routes to the general election ballot; it serves no outcome-neutral state objective, such as preventing corruption. Rather than *protect* election procedures, the Amendment *manipulates* them in order to disable an identifiable class of persons from service in the federal legislature. Indeed, in stark contrast to traditional petition signature requirements, the Arkansas Amendment seeks to punish a class of persons not because they lack sufficient support in the electorate, but because they enjoy too much of it.

Accordingly, petitioner's suggestion that affirmance of the decision below will upset 200 years of state election laws is baseless. State-imposed term limitations on federal legislators represent a complete departure from the "comprehensive, and in many respects complex, election codes" that States have evolved during this country's history. *Storer*, 415 U.S. at 730. And, as demonstrated above, they likewise represent a complete departure from the prescriptions of the Constitution and the democratic principles the Framers sought to enshrine there.

* * *

Petitioners claim that they cannot conceive how a State's decision "not to return persons to Congress . . . after many years of incumbency is any more a threat to the constitutional structure than if the people decide in a particular election not to re-elect a particular individual." *Term Limits Br.* at 35. But in the latter circumstance, the people in a particular district have decided to choose someone else as their representative. Under the Arkansas

a desire to regulate state officeholders and not to impose additional qualifications to serving in Congress"); *Signorelli v. Evans*, 637 F.2d 853, 859 (2d Cir. 1980) (resign-to-run is permissible because the "[State's] purpose is to regulate the [state office] that [appellant] holds, not the Congressional office he seeks").

Amendment, the people of that district may be prevented from electing the person they wish to choose.

As the debates at the Constitutional Convention reveal, the Framers plainly understood the difference. Believing that the people should be permitted the widest possible latitude in choosing their representatives, the Framers drafted a Constitution that established only a minimal set of qualifications for federal legislators. If, after more than two centuries, this principle is to be changed and a new policy of limiting years of service is to be employed, such an alteration in the composition of the national government can be accomplished only through an amendment to the Constitution, not through a patchwork quilt of State laws.

CONCLUSION

For the foregoing reasons, the judgment of the Arkansas Supreme Court should be affirmed.

Respectfully submitted,

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October 17, 1994

APPENDIX

APPENDIX

ARTICLE V OF THE ARTICLES OF CONFEDERATION

Article V. For the more convenient management of the general interests of the united states, delegates shall be annually appointed in such manner as the legislature of each state shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each state, to recal its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the Year.

No state shall be represented in Congress by less than two, nor by more than seven Members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office of the united states, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each state shall maintain its own delegates in a meeting of the states, and while they act as members of the committee of the states.

In determining questions in the united states, in Congress assembled, each state shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any Court, or place out of Congress, and the members of congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on congress, except for treason, felony, or breach of the peace.

"The Articles of Confederation," 2 THE DEBATE ON THE CONSTITUTION 926, 927-28 (Bernard Bailyn ed., 1993).

RESOLUTIONS FROM THE STATE RATIFYING
CONVENTIONS CONCERNING THE TIMES,
PLACES AND MANNER CLAUSE

NEW YORK

Mr. SMITH moved, as an amendment, to add to the first resolution proposed by Mr. JAY, so that the same, when amended, should read as follows:—

“Resolved, as the opinion of this committee, that the Constitution under consideration ought to be ratified by this Convention: upon condition, nevertheless, . . . That the Congress will not make or alter any regulation in this state respecting the times, places, and manner of holding elections for senators or representatives, unless the legislature of this state should neglect or refuse to make laws or regulations for the purpose, or from any circumstance be incapable of making the same; and that, in those cases, such power will only be exercised until the legislature of this state shall make provision in the premises . . .”

2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS
ON THE ADOPTION OF THE FEDERAL CONSTITUTION 411
(Jonathan Elliot ed., 1836).

COMMONWEALTH OF MASSACHUSETTS

*In Convention of the Delegates of the People of the
Commonwealth of Massachusetts, 1788.*

* * * *

And, as it is the opinion of this Convention, that certain amendments and alterations in the said Constitution would remove the fears and quiet the apprehensions of many of the good people of the commonwealth, and more effectually guard against an undue administration of the federal government, the Convention do therefore recommend that the following alterations and provisions be introduced into the said Constitution:—

* * * *

Thirdly, That Congress do not exercise the powers vested in them by the 4th section of the 1st article, but in cases where a state shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation in Congress, agreeably to the Constitution.

2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS
ON THE ADOPTION OF THE FEDERAL CONSTITUTION 176-
77 (Jonathan Elliot ed., 1836).

MARYLAND

In CONVENTION of the DELEGATES of the PEOPLE of the
STATE of MARYLAND, April 28, 1788.

We, the Delegates of the People of the state of Maryland, having fully considered the Constitution of the United States of America, reported by Congress, by the Convention of deputies from the United States of America, held in Philadelphia, on the 17th September, 1787, and submitted to us by a resolution of the General Assembly of Maryland, in November session, 1787, do, for ourselves, and in the name and on the behalf of the people of this State, assent to and ratify the said Constitution. In witness whereof we have hereunto subscribed our names,

TUESDAY, April 29, 1788.

* * * *

Proposed Amendments.

* * * *

Congress shall have no power to alter or change the regulations respecting the times, places, or manner of holding elections for senators or representatives.

* * * *

True extract from the minutes of the Convention, of the State of Maryland.

William Harwood, Clk. Con.

Done in Convention, April 26, 1788.

2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS
ON THE ADOPTION OF THE FEDERAL CONSTITUTION 552-
54, 556 (Jonathan Elliot ed., 1836).

VIRGINIA

On motion, *Ordered*, That a committee be appointed to prepare and report such amendments as by them shall be deemed necessary, to be recommended, pursuant to the second resolution; and that the Hon. George Wythe, Mr. Harrison, Mr. Matthews, Mr. Henry, Governor Randolph, Mr. George Mason, Mr. Nicholas, Mr. Grayson, Mr. Madison, Mr. Tyler, Mr. John Marshall, Mr. Monroe, Mr. Ronald, Mr. Bland, Mr. Meriwether Smith, Mr. Paul Carrington, Mr. Innes, Mr. Hopkins, Mr. John Blair, and Mr. Simms, compose the said committee.

* * * *

THURSDAY, June 26, 1788.

* * * *

Mr. WYTHE reported, from the committee appointed, such *amendments* to the proposed Constitution of government for the United States as were by them deemed necessary to be recommended to the consideration of the Congress which shall first assemble under the said Constitution, to be acted upon according to the mode prescribed in the 5th article thereof; and he read the same in his place, and afterwards delivered them in at the clerk's table, where the same were again read, and are as follows:—

* * * *

AMENDMENTS TO THE CONSTITUTION.

* * * *

"16th. That Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse, or be disabled, by invasion or rebellion, to prescribe the same.^[7]"

3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS
ON THE ADOPTION OF THE FEDERAL CONSTITUTION 656-
57, 659, 661 (Jonathan Elliot ed., 1836).

NORTH CAROLINA

Friday, August 1, 1788

AMENDMENTS TO THE CONSTITUTION.

* * * *

"17. That Congress shall not alter, modify, or interfere in, the times, places, or manner, of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse, or be disabled, by invasion or rebellion, to prescribe the same.

4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 240, 244, 246 (Jonathan Elliot ed., 1836).

NEW HAMPSHIRE

IN CONVENTION of the DELEGATES of the People of the State of NEW-HAMPSHIRE, June the Twenty-first, 1788.

* * * *

And as it is the opinion of this Convention that certain amendments and alterations in the said Constitution would remove the fears and quiet the apprehensions of many of the good people of this state, and more effectually guard against an undue administration of the Foederal Government, the Convention do therefore recommend that the following alterations and provisions be introduced into the said Constitution:

* * * *

3d. That Congress do not exercise the powers vested in them by the 4th section of the 1st article but in cases when a state shall neglect or refuse to make regulations therein mentioned, or shall make regulations contrary to a free and equal representation.

"The Ratifications and Resolutions of Seven State Conventions," 2 THE DEBATE ON THE CONSTITUTION 550-51 (Bernard Bailyn ed., 1993).

SOUTH CAROLINA

RATIFICATION of the CONSTITUTION, by
the STATE OF SOUTH-CAROLINA, May 23, 1788.

Yesterday the Convention determined that a Committee should be appointed to consider if any and what amendments ought to be made in the new Constitution, previous to putting the grand question.

The members of the Committee were Mr. E. Rutledge, Mr. Bee, Mr. Pringle, Judge Pendleton, Rev. Mr. Cummings, Mr. Hunter, Col. Huger, Col. Hill, and Mr. William Wilson.

The Committee reported in nearly the following words:

As the obtaining the following amendments *would tend to remove the apprehensions of some of the good people of this state*, and confirm the blessings intended by the said Constitution, We do declare, that as the right to regulate elections to the Foederal Legislature, and to direct the manner, times, and places of holding the same is, and ought to remain to all posterity, a fundamental right[.]

"The Ratifications and Resolutions of Seven State Conventions," 2 THE DEBATE ON THE CONSTITUTION 556 (Bernard Bailyn ed., 1993).

RESOLUTIONS FROM THE STATE RATIFYING
CONVENTIONS CONCERNING PROPOSED
ROTATION REQUIREMENTS

VIRGINIA

5th. That the legislative, executive, and judiciary powers of government should be separate and distinct, and that the members of the two first may be restrained from oppression by feeling and participating the public burthens, they should at fixed periods be reduced to a private station, return into the mass of the people; and the vacancies be supplied by certain and regular elections; in which all or any part of the former members to be eligible or ineligible, as the rules of the Constitution of Government, and the laws shall direct.

"The Ratifications and Resolutions of Seven State Conventions," 2 THE DEBATE ON THE CONSTITUTION 559 (Bernard Bailyn ed., 1993).

NORTH CAROLINA

5th. That the Legislative, Executive, and Judiciary powers of government should be separate and distinct, and that the members of the two first may be restrained from oppression by feeling and participating the public burthens, they should at fixed periods be reduced to a private station, return into the mass of the people; and the vacancies be supplied by certain and regular elections; in which all or any part of the former members to be eligible or ineligible, as the rules of the Constitution of Government, and the laws shall direct.

"The Ratifications and Resolutions of Seven State Conventions," 2 THE DEBATE ON THE CONSTITUTION 566 (Bernard Bailyn ed., 1993).

31

28

Nos. 93-1456 and 93-1828

Supreme Court, U.S.
FILED

NOV 16 1994

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

U.S. TERM LIMITS, INC., ARKANSANS FOR
GOVERNMENTAL REFORM, INC., FRANK GILBERT,
GREG RICE, LON SCHULTZ, and SPENCER PLUMLEY,
Petitioners,

v.

RAY THORNTON, *et al.*,
Respondents.

WINSTON BRYANT,
ATTORNEY GENERAL OF ARKANSAS,
Petitioner,

v.

BOBBIE E. HILL, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of Arkansas

REPLY BRIEF FOR PETITIONERS
U.S. TERM LIMITS, INC., *et al.*

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TABLE OF CONTENTS

	Page
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iii
ARGUMENT IN REPLY	1
I. THIS COURT HAS NEVER INVALIDATED STATE BALLOT REGULATIONS UNDER ARTICLE I	1
A. <i>Storer v. Brown</i> Rejected Respondents' Arti- cle I Argument	2
B. Respondents Seek To Substitute Article I for the Fourteenth Amendment	2
C. Respondents' Open-Ended Definition of "Qual- ifications" Is Unmanageable and Contrary to Precedent	4
D. Respondents' Article I Theory Would Invali- date State Laws This Court Has Approved....	6
E. Amendment 73 Is Not "A Mere Contrivance" ..	6
F. The Record Does Not Support an Assumption That Longtime Officeholders Cannot Win as Write-Ins	7
G. Amendment 73 Does Not Deny the Right To Vote	9
II. CONGRESS CAN REJECT AMENDMENT 73..	10
III. THE STATES DO NOT REQUIRE A FED- ERAL GRANT OF POWER	11
IV. RESPONDENTS HAVE NOT MET THE BUR- DEN TO DEMONSTRATE A CLEAR CON- STITUTIONAL PROHIBITION OF STATE QUALIFICATIONS	11
A. <i>Powell v. McCormack</i> Declined To Adopt Respondents' Theory	12

TABLE OF CONTENTS—Continued

	Page
B. The Minimum Qualifications of Article I Did Not by Negative Implication Prohibit All Others	13
C. Original Laws Reflect Original Understanding	16
D. Expectations	17
V. THE CONSTITUTION AFFIRMATIVELY GRANTS POWER	18
A. Article I, § 2, and the Seventeenth Amendment Broadly Grant Power	18
B. Article I, § 4, Broadly Grants Power	19
CONCLUSION	20

LIST OF PARTIES

The League of Women Voters is not a party in this case. J.A. 181.

TABLE OF AUTHORITIES

Cases:	Page
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	2, 4, 9
<i>Arizona v. California</i> , 283 U.S. 423 (1931)	7
<i>Arizona v. Rumsey</i> , 467 U.S. 203 (1984)	1
<i>Baker v. Carr</i> , 369 U.S. 186 (1962)	10
<i>Bose Corp. v. Consumers Union</i> , 466 U.S. 485 (1984)	8
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973)	6
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	19, 20
<i>Burdick v. Takushi</i> , 112 S. Ct. 2059 (1992)	8
<i>Burson v. Freeman</i> , 112 S. Ct. 1846 (1992)	7
<i>Burton v. United States</i> , 202 U.S. 344 (1906)	17
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	8
<i>Clements v. Fashing</i> , 457 U.S. 957 (1982)	3, 6
<i>Dames & Moore v. Regan</i> , 453 U.S. 654 (1981)	11
<i>Fiske v. Kansas</i> , 274 U.S. 380 (1927)	8
<i>Ford v. United States</i> , 273 U.S. 593 (1927)	13
<i>Fowler v. Adams</i> , 315 F. Supp. 592 (M.D. Fla. 1970), appeal dismissed, 400 U.S. 986 (1971)	5
<i>Garcia v. San Antonio Metro. Transit Auth.</i> , 469 U.S. 528 (1985)	15
<i>Goldstein v. California</i> , 412 U.S. 546 (1973)	14
<i>Gomillion v. Lightfoot</i> , 364 U.S. 339 (1960)	3
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991)	3, 6, 11, 15, 20
<i>Guaranty Trust Co. v. York</i> , 326 U.S. 99 (1945)	5
<i>Guinn v. United States</i> , 238 U.S. 347 (1915)	3
<i>Harisiades v. Shaughnessy</i> , 342 U.S. 580 (1952)	11
<i>Hopmann v. Connolly</i> , 746 F.2d 97 (1st Cir. 1984), vacated in part, 471 U.S. 459 (1985)	5
<i>Jenness v. Fortson</i> , 403 U.S. 431 (1971)	9
<i>Joyner v. Mofford</i> , 706 F.2d 1523 (9th Cir.), cert. denied, 464 U.S. 1002 (1983)	5
<i>Lane v. Wilson</i> , 307 U.S. 268 (1939)	3
<i>Lassiter v. Northampton County Bd.</i> , 360 U.S. 45 (1959)	3, 9
<i>Lubin v. Panish</i> , 415 U.S. 709 (1974)	9
<i>Lukens v. Brown</i> , 368 F. Supp. 1340 (S.D. Ohio 1974)	13
<i>Mandel v. Bradley</i> , 432 U.S. 173 (1977)	9
<i>McPherson v. Blacker</i> , 146 U.S. 1 (1892)	14, 16
<i>Moore v. McCartney</i> , 425 U.S. 946 (1976)	3

TABLE OF AUTHORITIES—Continued

	Page
<i>Munn v. Illinois</i> , 94 U.S. 113 (1877)	7
<i>Munro v. Socialist Workers Party</i> , 479 U.S. 189 (1986)	2
<i>New York v. United States</i> , 112 S. Ct. 2408 (1992)	20
<i>New York State Club Ass'n v. City of New York</i> , 487 U.S. 1 (1988)	11
<i>New York State Dep't v. Dublino</i> , 413 U.S. 405 (1973)	14
<i>Nixon v. United States</i> , 113 S. Ct. 732 (1993)	10
<i>Norman v. Reed</i> , 502 U.S. 279 (1992)	2
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969)	12, 13, 19
<i>Prudential Ins. Co. v. Benjamin</i> , 328 U.S. 408 (1946)	13
<i>Public Citizen, Inc. v. Miller</i> , 992 F.2d 1548 (11th Cir. 1993)	5
<i>Public Citizen, Inc. v. Miller</i> , 813 F. Supp. 821 (N.D. Ga.), <i>aff'd</i> , 992 F.2d 1548 (11th Cir. 1993)	5
<i>Secretary of State v. McGucken</i> , 244 Md. 70, 222 A.2d 693 (1966)	13
<i>Ex parte Siebold</i> , 100 U.S. 371 (1880)	10, 15
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	2, 5, 9
<i>Sweet v. Rechel</i> , 159 U.S. 380 (1895)	7
<i>Taylor v. Freeland & Kronz</i> , 112 S. Ct. 1644 (1992)	1
<i>Thomas v. Union Carbide Agric. Prods. Co.</i> , 473 U.S. 568 (1985)	14
<i>U.S. Civil Serv. Comm'n v. National Ass'n</i> , 413 U.S. 548 (1973)	6
<i>U.S. Department of Commerce v. Montana</i> , 112 S. Ct. 1415 (1992)	14
<i>United States v. Classic</i> , 313 U.S. 299 (1941)	9, 18, 19
<i>United States v. Erika, Inc.</i> , 456 U.S. 201 (1982) ..	1
<i>United States v. Gradwell</i> , 243 U.S. 476 (1917) ..	20
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968)	7
<i>Vance v. Bradley</i> , 440 U.S. 93 (1979)	11
<i>Washington v. Davis</i> , 426 U.S. 229 (1976)	3
<i>Wesberry v. Sanders</i> , 376 U.S. 1 (1964)	10, 19
<i>Wilbur v. Mahan</i> , 3 F.3d 214 (7th Cir. 1993)	6

TABLE OF AUTHORITIES—Continued

	Page
<i>Williams v. Tucker</i> , 382 F. Supp. 381 (M.D. Pa. 1976)	5
<i>Wisconsin Pub. Intervenor v. Mortier</i> , 501 U.S. 597 (1991)	14
<i>Ex parte Yarbrough</i> , 110 U.S. 651 (1884)	16
<i>Constitutional Provisions:</i>	
U.S. Constitution, Article I	1, <i>passim</i>
Article I, § 2	2, 9, 10, 13, 14, 18, 19, 20
Article I, § 3	10, 13, 17
Article I, § 4	1, 5, 6, 10, 18, 19, 20
Article I, § 5	12, 13, 20
Article II, § 1	14
Article III, § 1	14
Article III, § 2	15
Article VI	17
First Amendment	1, 2, 3, 9, 20
Fifth Amendment	20
Tenth Amendment	11, 19, 20
Fourteenth Amendment	1, 2, 3, 4, 6, 9
Fifteenth Amendment	3
Seventeenth Amendment	18, 20
Ark. Const., amend. 7	18
Ark. Const., amend. 73	1, <i>passim</i>
Mo. Const., art. III, § 45	16
Nev. Const., art. II, § 10.4	16
<i>Statutes:</i>	
28 U.S.C. § 44	15
Act of April 30, 1790, ch. 9, § 21, 1 Stat. 117	17
Alaska Stat. § 15.30.130	16
Md. Act of Jan. 6, 1810, ch. 22, § 2	16
Wash. Rev. Code § 29.68	7
Wash. Laws of 1993, ch. 1, § 8	16
<i>Miscellaneous:</i>	
Brief of Appellants, <i>Storer v. Brown</i> , No. 72-812, O.T. 1972	2
THE COMPLETE ANTI-FEDERALIST (H. Storing ed. 1981)	18

TABLE OF AUTHORITIES—Continued

	Page
E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957 (1957)	17
J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1836)	15, 19, 20
M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (rev. ed. 1966)	5, 13, 14, 20
THE FEDERALIST (J. Cooke ed. 1961)	14, 15
Paschal, <i>The House of Representatives: "Grand Depository of the Democratic Principle"?</i> , 17 LAW & CONTEMP. PROBS. 276 (1952)	20
Steinfeld, <i>Property and Suffrage in the Early American Republic</i> , 41 STAN. L. REV. 335 (1989)	16
J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833)	17
C. WARREN, THE MAKING OF THE CONSTITUTION (1928)	12
G. WHITE, 3 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35 (1988)	17
C. WILLIAMSON, AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY 1760-1860 (1960)	16
WORKS OF THOMAS JEFFERSON (P. Ford ed. 1905)	12, 17

I. THIS COURT HAS NEVER INVALIDATED STATE BALLOT REGULATIONS UNDER ARTICLE I.

At issue is not "term limits," but a particular state constitutional provision—section 3 of Amendment 73 to the Constitution of Arkansas, enacted directly by vote of the people of that State. It provides, prospectively only, that after a person has served specified periods in the House or Senate, that person's name will no longer appear on the printed election ballot for those respective offices. But Amendment 73 does not prevent anyone from campaigning for those offices; from being elected; from filling a vacancy; or from serving. P.C.A. 15a. It is, in short, a restriction of "ballot access."

States have determined which names are printed on congressional election ballots for as long as States have printed ballots. They have kept candidates from the ballot based on, for example, past political affiliation or current officeholding or employment. Some such laws may or may not, depending on their purpose and effect, be held by the courts to deny rights guaranteed by the First and Fourteenth Amendments. And all such state laws are constantly subject to the opportunity and authority of Congress to revise or reject them, as expressly provided in Article I, § 4, of the Constitution.

Respondents, however, have chosen not to press a Fourteenth Amendment claim.¹ Instead, they seek to break new ground: to hold that without regard to the Fourteenth Amendment, some state ballot and election laws are now to be labeled as "qualifications," and on that basis be held to violate Article I. Until this year no ballot regulation had ever been invalidated on that theory, and the idea that ballot restrictions are to be reviewed under Article I has been repeatedly rejected. Respondents have shown no "special justification" for abandoning that settled rule. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

¹ See Th. Br. i; Hill Br. i; S.G. Br. i. Cf. *Taylor v. Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992); *United States v. Erika, Inc.*, 456 U.S. 201, 211 n.14 (1982). The Supreme Court of Arkansas did not decide whether § 3 violated the Fourteenth Amendment.

A. *Storer v. Brown* Rejected Respondents' Article I Argument.

In *Storer v. Brown*, 415 U.S. 724 (1974), two candidates for Congress challenged a California law that excluded their names from the ballot because of their prior political affiliation.² They argued for 30 pages that the California ballot laws "violate Article I, Section 2, Clause 2 of the United States Constitution by adding qualifications for the Office of the United States Congress." Brief of Appellants, No. 72-812, O.T. 1972, at 34-63. This Court responded with a holding emphatic enough to settle that point once and for all: "The argument is wholly without merit." 415 U.S. at 746 n.16. The ballot exclusion based on prior political affiliation, this Court held, "no more establishes an additional requirement for the office of Representative than the requirement that the candidate win the primary." *Id.*

B. Respondents Seek To Substitute Article I for the Fourteenth Amendment.

Weighing the constitutionality of state ballot-access laws is something this Court does regularly—not under Article I, but rather to decide whether they are so irrational or invidiously discriminatory that they violate the Fourteenth Amendment, including the First Amendment principles it incorporates. *E.g.*, *Storer v. Brown*, *supra*; *Norman v. Reed*, 502 U.S. 279 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983). The Fourteenth Amendment is quite capable of handling the imaginative "nightmares," Hill Br. 34 (Congress restricted to lawyers, etc.), that respondents posit.

² The Solicitor General incorrectly states that "no candidate was prevented from entering the race to gain a spot on the general election ballot." S.G. Br. 20 (emphasis in original). Because of prior affiliation, the *Storer* plaintiffs were completely barred from entering any party primary or seeking a ballot spot as an independent. The California law in *Storer* "was an absolute bar to attaining a ballot position." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986).

To borrow an antique but apt phrase, respondents' claim "sounds in" the Fourteenth Amendment, not Article I. They do not deny state power to regulate ballots; instead, they complain it has been misused to treat them unequally. Respondents complain, for example, that Amendment 73 unfairly denies longtime officeholders an advantage allowed some others. Hill Br. 38. They say Amendment 73 "does not deal rationally;" that there is "no reason" for it to begin at six years in the House or twelve in the Senate; that it is inadequately "calibrate[d]." Hill Br. 31. They call it discriminatory. Hill Br. 37-38.

But all these are First and Fourteenth Amendment considerations; and the cases respondents cite are First and Fourteenth Amendment cases.³ Respondents also say Amendment 73 violates Article I because of its "purpose and effect"—another concept familiar in First and Fourteenth Amendment jurisprudence. Even in Fourteenth Amendment discrimination cases, "purpose" becomes relevant only to explain a demonstrable "effect." See *Washington v. Davis*, 426 U.S. 229, 244-45 (1976); *cf. Lassiter v. Northampton County Bd.*, 360 U.S. 45, 50-51 (1959). And the "effect" respondents allege—practical impossibility of election—is simply not shown by the record. See pp. 7-9, *infra*.

Respondents would transform Article I into something resembling the Fourteenth Amendment, but escaping all the Fourteenth Amendment decisions that are so unfavorable to them.⁴ Respondents complain, for instance,

³ In fact, *Gomillion v. Lightfoot*, 364 U.S. 839 (1960), *Lane v. Wilson*, 307 U.S. 268 (1939), and *Guinn v. United States*, 238 U.S. 347 (1915), all quoted by the Solicitor General, S.G. Br. 23, were Fifteenth Amendment discrimination cases.

⁴ Fourteenth Amendment challenges even to state laws that flatly limit terms or tenure of state officials have been consistently rejected. See P.C.A. 19a-20a; *Moore v. McCartney*, 425 U.S. 946 (1976) (no substantial federal question); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); USTL Br. 22. And Amendment 73 "in no way depend[s] upon political affiliation or political viewpoint." *Clements v. Fashing*, 457 U.S. 957, 965 (1982) (opinion of Rehnquist, J.).

of "hobbl[ing]." Hill Br. 4. Fourteenth Amendment analysis would not stop there, but would look at the whole picture, to consider also the State's interests, including responsive representation and fairness, and to balance the extent to which "hobbled" racers had, to continue the metaphor, been supplied with stimulants that others were denied.⁶ Under the Fourteenth Amendment, "constitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus-paper test.'" *Anderson v. Celebrezze*, *supra*, 460 U.S. at 789. Yet by invoking Article I, respondents say, they can dismiss consideration of the governmentally-conferred advantages of incumbents as "frivolous." Hill Br. 31.

C. Respondents' Open-Ended Definition of "Qualifications" Is Unmanageable and Contrary to Precedent.

Respondents argue that a state election law violates Article I whenever it "establishes an additional, and thus unconstitutional qualification." Th. Br. 5. They say a "qualification" is to be identified by a "standard" based on "essential democratic principles," Th. Br. 6, or "important democratic principles," *id.* at 36—which they argue call for rejection of the choice of 60% of the voters of Arkansas.⁶ As used by respondents, "qualification" states a conclusion, not a test.

⁶ For a former ten-term Representative's summary of his governmentally-conferred advantages, see State of Wash. Br. A1-A15. In the November 8, 1994 congressional elections, with a few prominent exceptions, incumbents who ran overwhelmingly succeeded. Of 385 House members seeking reelection, 348 (90%) won and two districts (both with first-term incumbents) are undecided; 17 of the 35 losers were in their first term, 2 in their second. Of 26 Senate incumbents running, 24 (92%) won.

⁶ The Hill respondents invent their own elastic definition of "qualification": a characteristic "that will *almost always* be required as a *practical matter* to achieve a desired office." Hill Br. 30 (emphasis supplied). Finding even that too restrictive, they propose a test that is totally circular: "whether the Measure violates the principle that the qualifications 'fixed in the Constitution' may not be supplemented." *Id.*

As Special Chief Justice Cracraft concisely summarized the long-accepted understanding, "a person is qualified within the meaning of Article I of the United States Constitution if permitted to serve if elected." P.C.A. 37a (dissenting opinion). In addition to *Storer v. Brown*, every federal Circuit to consider such a claim has followed that same objective, common-sense rule, rejecting theories that would review state laws under Article I based upon effects on prospects for election.⁷

Respondents propose to distinguish all these cases, and *Storer v. Brown* as well, by labeling all the laws they upheld as "procedural," without offering any definition for that elusive term. *Cf. Guaranty Trust Co. v. York*, 326 U.S. 99, 108-09 (1945). If Article I were to prohibit state laws that unequally favor election success, then as *Storer* pointed out, ballot laws reserving places for primary-election winners would be the first to go, for they favor established parties and regularly influence outcomes.

Nor has the specific authorization of state "Manner" regulations in Article I, § 4, ever been confined to a few "general ground rules." S.G. Br. 5. Madison on the contrary actually anticipated that "[w]henver the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." 2 FARRAND 241. For that very reason, he explained, the broad override

⁷ See *Joyner v. Mofford*, 706 F.2d 1523, 1531 (9th Cir.) ("does not impose a . . . qualification"), *cert. denied*, 464 U.S. 1002 (1983); *Hopfmann v. Connolly*, 746 F.2d 97, 103 (1st Cir. 1984) ("the test . . . is whether the candidate 'could be elected if his name were written in'"), *vacated in part on other grounds*, 471 U.S. 459 (1985); *Public Citizen, Inc. v. Miller*, 992 F.2d 1548 (11th Cir. 1993), *adopting* 813 F. Supp. 821, 833 (N.D. Ga. 1993) ("cannot be argued seriously"); *accord, Williams v. Tucker*, 382 F. Supp. 381, 388 (M.D. Pa. 1976) (three-judge court) ("totally without merit"); *Fowler v. Adams*, 315 F. Supp. 592, 595 (M.D. Fla. 1970) (three-judge court) ("no constitutional requirement that the state print anyone's name on the ballot"), *appeal dismissed*, 400 U.S. 986 (1971). State supreme courts hold the same. See USTL Br. 15-17.

power of Congress, also in § 4, was necessary. *Id.* at 240; see also pp. 19-20, *infra*.⁸

D. Respondents' Article I Theory Would Invalidate State Laws This Court Has Approved.

This Court and others for many years have held that States may not just deny advantages, but impose burdens on congressional candidacy, including even removal of candidates from their offices and employment. *Clements v. Fashing*, 457 U.S. 957 (1982); cases and statutes cited at USTL Br. 29, 47, 69a-74a. Some States have gone even further, and flatly prohibited the congressional candidacies of thousands of employees. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); see also *U.S. Civil Serv. Comm'n v. National Ass'n*, 413 U.S. 548 (1973). That they may do so is "settled doctrine." *Wilbur v. Mahan*, 3 F.3d 214, 219 (7th Cir. 1993) (concurring opinion).

Respondents have no answer to this "settled doctrine" except to observe that the States have a "legitimate interest" in such laws. Th. Br. 48. Of course they do—just as the people of Arkansas did here when they decided to enact Amendment 73. See *Gregory v. Ashcroft*, 501 U.S. 452, 471-73 (1991); USTL Br. 19-25; State Br. 18-27. But if Article I, as respondents argue, took away state power that inhibits congressional candidacies, then all those decisions, although correct under the Fourteenth Amendment, were erroneous under Article I, and Hatch-Act-type prohibitions in more than a dozen States would become unconstitutional. See USTL Br. 69a-74a.

E. Amendment 73 Is Not "A Mere Contrivance."

Respondents argue that the actual provisions of Amendment 73 should be ignored as "a mere contrivance," Th. Br. 42, "designed to circumvent," S.G. Br. 23. But the fact remains that § 3 of Amendment 73 does not set term

⁸ Several of the original state laws that set property and other requirements specifically stated that they were regulations of "Times, Places and Manner." See USTL Br. 13a, 16a, 17a.

limits.⁹ Moreover, the distinction between ballot restrictions and disqualifications is real and is demonstrably significant to voters.¹⁰ "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968); *Arizona v. California*, 283 U.S. 423, 455 (1931). There is nothing inappropriate in adopting a less restrictive policy both to attract more support and to prevent claims (however flawed) of an Article I violation—claims which, brushing aside Amendment 73's actual provisions, respondents make anyway.

F. The Record Does Not Support an Assumption That Longtime Officeholders Cannot Win as Write-Ins.

Respondents argue that this Court is bound by the unsupported statement in the Arkansas plurality opinion that established incumbents who campaign to be reelected by write-in have only "glimmers of opportunity." P.C.A. 15a. That would be a total departure from the way this Court has dealt with issues of "constitutional fact" in the past, and also would require rejection of the record as it exists in this case.

1. Facts to make a statute unconstitutional are not assumed. "It is a well-settled rule of constitutional exposition, that if a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed." *Sweet v. Rechel*, 159 U.S. 380, 393 (1895); accord, e.g., *Munn v. Illinois*, 94 U.S. 113, 132 (1877). Moreover, "[i]t is . . . difficult to make specific findings about the effects of a voting regulation." *Burson v. Freeman*, 112 S. Ct. 1846, 1856 (1992).

⁹ The "term limits" in Amendment 73's preamble refer of course to §§ 1 and 2, which are different from § 3 in that they limit the number of terms specified state officials may serve.

¹⁰ For example, in Washington a proposal to limit terms was defeated in 1991, but a ballot restriction was adopted in 1992. Wash. Rev. Code § 29.68.

2. There is very little experience with elections in which established officeholders, rather than fringe candidates, seek election as write-ins. See J.A. 201. "[W]rite-in candidates are longshots more often than not." *Burdick v. Takushi*, 112 S. Ct. 2059, 2070 (1992) (Kennedy, J., dissenting). But when the write-in candidate is well known, like former governor Thurmond in 1954, see J.A. 172-73, the experience can be quite different. Respondents dismiss the past write-in election of even a Representative from Arkansas, J.A. 169-70, 201-02, as a fluke attributable to his popular platform. Th. Br. 42. But that is exactly the point: the record is that a popular candidate can succeed by write-in.

3. Respondents say the plurality's unelaborated "glimmers of opportunity" sentence, P.C.A. 15a, reviewing a summary judgment, is a finding of fact that "is not reviewable" by this Court. Th. Br. 40. But it did not purport to be a finding of fact, and even if it had, no state-court factfinding can bind this Court on an issue of federal constitutional law. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 n.17 (1984); *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927). Nor could such a factfinding be supported by the record, which on this point contains only, besides some past election results, the un rebutted affidavit of an expert scholar of elections that "[g]iven a choice, any rational candidate would prefer to be a well-known incumbent write-in candidate rather than a political novice who happens to have his or her name printed on the ballot." J.A. 204.¹¹

4. Respondents also argue, inconsistently, that "glimmers" was a legal ruling of state law, that "both state courts held that Amendment 73 is a term limits law" and that "[s]tate court interpretations of state law are binding on this Court." Th. Br. 39-40. But what the Arkan-

¹¹ Respondents suggest that this was disputed by the simple assertion of respondent Thornton that "my ability to be reelected as Congressman depends on my ability to have my name on the . . . ballot." J.A. 163. But cf. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

sas court clearly held was that § 3 of Amendment 73 does not forbid campaigning, election, or service. P.C.A. 15a. Its interpretation of Article I is reviewable.

5. No one is contending that a candidate whose name is not on the ballot has as easy a time as one whose name is printed there. No one is denying that Amendment 73 was intended to withhold one substantial advantage among the many that longtime incumbents already enjoy—yet without precluding their election if the voters really want them back. But respondents are asking this Court to rule as a matter of law that even a longtime incumbent has no significant opportunity to win by write-in. This Court has never so held. Fourteenth Amendment decisions have weighed a State's election system as a whole, including the availability or not of write-in. In some cases it met First and Fourteenth Amendment standards, in some it did not. Compare *Anderson v. Celebrezze*, *supra*, 460 U.S. at 799 n.26, with *Jenness v. Fortson*, 403 U.S. 431, 434, 438 (1971), and *Storer v. Brown*, *supra*, 415 U.S. at 736 n.7. And such Fourteenth Amendment judgments, this Court has held, are not to be made *a priori*, but depend on proper findings of fact. *Mandel v. Bradley*, 432 U.S. 173, 178 (1977); *Storer v. Brown*, *supra*, 415 U.S. at 740, 742.

G. Amendment 73 Does Not Deny the Right To Vote.

The Solicitor General, citing as textual support Article I, § 2's provision that the House shall be "chosen . . . by the People," argues that "Amendment 73 is unconstitutional because it impairs the right of the voters of Arkansas to elect candidates of their choice." S.G. Br. 15. He turns § 2 on its head, for here the people did choose. See pp. 18-19, *infra*. Voters remain free to cast their votes for longtime officeholders, and to have those votes counted equally, which is what Article I requires. Moreover, the right to vote is not a right to vote for a particular candidate, see *Lubin v. Panish*, 415 U.S. 709, 716 (1974), and it is not a right to prevail. See, e.g., *United States v. Classic*, 313 U.S. 299, 318 (1941); see also *Lassiter*, *supra*, 360 U.S. at 51. If, as the Solicitor General ar-

gues, the right to vote were denied simply by not printing a candidate's name on the ballot, then state primary-election laws would be unconstitutional.¹²

II. CONGRESS CAN REJECT AMENDMENT 73.

Respondents never deal with the fact that Congress—the very body assigned by the Constitution to oversee the congressional election laws enacted by the States—has apparently concluded that Amendment 73 does not pose a threat to national interests. Respondents acknowledge that Congress under Article I, § 4, has “extraordinary,” Th. Br. 4, power to invalidate Amendment 73 any time it wants to. That, the Solicitor General says, was indeed the whole purpose of § 4. S.G. Br. 5, 17-18. Yet although Amendment 73 and laws like it have been on the books now for over two years, Congress has done nothing to override it. Neither respondent Thornton nor anyone else has even introduced a bill to do so.¹³

Courts could with comprehensible standards invalidate a state law that, for example, sought to alter the minimum age requirements of §§ 2 and 3 of Article I, or to deny an equal vote. *E.g.*, *Wesberry v. Sanders*, 376 U.S. 1 (1964). But when respondents ask to interpret the structural assignments of power in Article I according to “essential democratic principles” and predictions of election outcomes, they move very far from “judicially discoverable and manageable standards,” especially in light of § 4’s “textually demonstrable constitutional commitment of the issue to a coordinate political department.” *Nixon v. United States*, 113 S. Ct. 732, 735 (1993), quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962). Even assuming justiciability, this Court has rejected “standards which would require us to equate our

¹² The Solicitor General also argues that Amendment 73 violates Article I because it “creat[es] voter confusion by misleading voters as to the identity of legitimate candidates.” S.G. Br. 26. But all laws excluding anyone from the ballot would fail that test.

¹³ *Cf. Ex parte Siebold*, 100 U.S. 371, 388 (1880): “The State laws [governing congressional elections] which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress.”

political judgment with that of Congress.” *Harisiades v. Shaughnessy*, 342 U.S. 580, 590 (1952); *cf. Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981); *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

III. THE STATES DO NOT REQUIRE A FEDERAL GRANT OF POWER.

Respondents propose a profound departure from how the Constitution has been understood: they argue that “only an express delegation of authority could allow the States to limit the length of service for members of the national legislature.” Th. Br. 11; see also P.C.A. 12a. That is not correct. The federal government is one of enumerated powers. But unless constitutionally prohibited, the States do not require a grant of power to legislate on this or any other subject. *Gregory v. Ashcroft*, *supra*, 501 U.S. at 457. That is what the Tenth Amendment confirms.

So respondents urge that the Tenth Amendment now be reread, unlike the rest of the Constitution, as frozen in time—to reserve to the States only powers that existed prior to adoption of the Constitution. Hill Br. 39-40; S.G. Br. 26-27. But no decision of this Court has ever suggested such a thing, and respondents do not respond at all to petitioners’ discussion that (1) the Tenth Amendment does not say that; (2) the States had traditionally imposed numerous restrictions—including term limits—on their representatives in the Confederation Congress; and (3) the Tenth Amendment at the least certainly reserves powers not excluded as of its adoption date—which is not 1789, but 1791. See USTL Br. 14 n.17.

IV. RESPONDENTS HAVE NOT MET THE BURDEN TO DEMONSTRATE A CLEAR CONSTITUTIONAL PROHIBITION OF STATE QUALIFICATIONS.

State laws are presumed constitutional, and “the burden of showing a statute to be unconstitutional is on the challenging party, *not* on the party defending the statute.” *New York State Club Ass’n v. City of New York*, 487 U.S. 1, 17 (1988) (emphasis in original). Reacting perhaps to the burden they bear, the absence of textual support, the ambiguity of discussions, and the widespread

early practice that utterly negates their contentions, respondents repeatedly describe the chain of inferences they propose as "clear," Th. Br. 5, "clear beyond a reasonable doubt," Hill Br. 12, and any other conclusion as "simply inconceivable," Th. Br. 30. Yet surely, if the many briefs filed in this case demonstrate anything, it is that any implied constitutional prohibition of state laws adding disqualifications (which, as earlier emphasized, Amendment 73 is not) would be at best far from clear or inevitable. Jefferson called it "one of the doubtful questions," 11 WORKS 380, and even the three opinions of the Arkansas majority respectively described the issue as "inconclusive," P.C.A. 12a, "a close question," P.C.A. 26a, and "not definitively and categorically settled," P.C.A. 41a. Although respondents propose inferences and surmises, they have come up with no statement of the Framers—not one—providing unambiguous support for their position.

A. *Powell v. McCormack* Declined To Adopt Respondents' Theory.

The significant passage in *Powell v. McCormack* is the one respondents all ignore. Presented with the *very argument* that the minimum qualifications listed in Article I by negative implication barred enactment of any others, this Court *expressly declined* to accept it:

"Relying heavily on Charles Warren's analysis of the Convention debates, petitioners argue that the proceedings manifest the Framers' unequivocal intention to deny either branch of Congress the authority to add to or otherwise vary the membership qualifications expressly set forth in the Constitution. *We do not completely agree, for the debates are subject to other interpretations.*"

395 U.S. 486, 532 (1969) (footnote omitted; emphasis supplied).¹⁴ *Powell* held that if the word "Qualifications" in Article I, § 5, were not defined as qualification provi-

¹⁴ Even the observations by Mr. Warren concerned only "power in Congress to fix qualifications," in the limited context of Article I, § 5. C. WARREN, *THE MAKING OF THE CONSTITUTION* 420, 422 (1928) (emphasis supplied).

sions specified in the Constitution, and a single House sitting as "Judge" could add other requirements as well, then the distinction in § 5 between the power to exclude (by majority vote) and the power to expel (by two-thirds vote) would collapse; exclusion without limiting standards was "too important to be exercised by a bare majority." 395 U.S. at 536, quoting 2 FARRAND 254 (Madison).¹⁵

B. The Minimum Qualifications of Article I Did Not by Negative Implication Prohibit All Others.

Respondents argue that by "implication" and the old and unreliable maxim of *expressio unius est exclusio alterius*, cf. *Ford v. United States*, 273 U.S. 593, 612 (1927), Article I's minimum requirements should silently exclude all others. Hill Br. 2, 13 n.21, 24 n.52. But "the business of negative implication is slippery," *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 418 (1946), particularly as to state power. Here it has many difficulties:

1. The proposition that the listings in §§ 2 and 3 were intended to be exclusive is immediately undercut by the fact that the Constitution itself contains other qualification provisions, as the Solicitor General recognizes. S.G. Br. 7 n.4; see *Powell*, 395 U.S. at 520 n.41.

2. Language to make the listed minimums exclusive was in the original draft of the Committee on Detail, but was deleted. See 2 FARRAND 137 n.6, 139; USTL Br. 39. Respondents ask the Court to accept their unsupported speculation, contrary to all usual rules of construction, that this was inadvertent or because it was superfluous,

¹⁵ Repeated statements to the effect that "every federal and state court that has considered the issue" agrees with respondents, Hill Br. 26, 4, 27, Th. Br. 37 n.35, are seriously in error. Besides the cases cited at USTL Br.47 n.69, see *Lukens v. Brown*, 368 F. Supp. 1340 (S.D. Ohio 1974) (three-judge court) (disqualification for failure to file accounting); *Secretary of State v. McGucken*, 244 Md. 70, 222 A.2d 693 (1966) (requirement to appoint treasurer). Many cases also uphold state ballot-access laws; see p. 5, *supra*.

rather than because it was rejected. Th. Br. 22 n.22; Hill Br. 14.¹⁶

3. Petitioners pointed out that Hamilton's comment that the qualifications were "fixed" could not mean fixed from change by the States, because the qualifications of voters—which he said were "fixed" also—are by the first clause of Article I, § 2, left entirely up to the States to determine. USTL Br. 43. The Solicitor General's response is that Hamilton was mistaken. S.G. Br. 21 n.13. But Madison said the same thing. 2 FARRAND 249-50; see USTL Br. 43.

4. Respondents ignore the many decisions holding that constitutional provisions will not normally be interpreted as silently preempting state power. See *Goldstein v. California*, 412 U.S. 546 (1973); FEDERALIST No. 32; cases at USTL Br. 32-35. There is a presumption against preemption of state power by statute, also. *E.g.*, *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991); *New York State Dep't v. Dublino*, 413 U.S. 405, 413 (1973).

5. Similar constitutional provisions are not freighted with negative implications. Article I, § 2, provides that Representatives are to be chosen "by the People of the several States;" nevertheless States (even before Congress required it) could restrict voters to voting in districts for a single candidate. *McPherson v. Blacker*, 146 U.S. 1, 26 (1892). Article II, § 1, lists qualifications for Presidential electors; but States from the beginning added property and district residency requirements as well. See USTL Br. 38, 19a-24a. Article III, § 1, authorizes establishment of inferior federal courts; yet that does not prohibit inferior federal courts existing entirely outside Article III. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985). By assigning "the judicial Power of the United States" to federal courts, Article III does not thereby

¹⁶ There could also have been a decision not to address the issue by the 1787 "masters of compromise," *U.S. Dep't of Commerce v. Montana*, 112 S. Ct. 1415, 1429 (1992), who did not attempt to resolve all uncertainties in the Constitution.

exclude state courts from concurrent jurisdiction; to read it otherwise, Hamilton admonished, "would amount to an alienation of State power by implication." FEDERALIST No. 82 at 554. Article III, § 2, guarantees jury trials in criminal cases; the argument that by *expressio unius* civil juries were denied, Hamilton called "inapplicable to a constitution of government." FEDERALIST No. 83 at 560. *Cf.* also 28 U.S.C. § 44(c) (residency qualification for Circuit Judges).

6. Respondents also argue that the minimums listed in Article I are so comprehensive that they silently occupied the field, and exclude state qualifications. Hill Br. 39; Th. Br. 6, 7, 10. But it was *the States* to which Article I left the "field" of regulating congressional elections, an important check on federal authority, *Garcia v. San Antonio M.T.A.*, 469 U.S. 528, 551 (1985), as to which there is "not the slightest difficulty" in States' legislating. *Ex parte Siebold*, 100 U.S. 371, 384 (1880). If the minimum qualifications occupied any field at all, it would more reasonably be described as legislation on the subjects they address: age, citizenship or residency. There were "no qualifications *required* except those of age and residence." 3 ELLIOT 8 (Nicholas) (emphasis supplied).

7. Respondents repeatedly stress that the Framers did not require national term limits in the Constitution. Hill Br. 11; Th. Br. 5. But of course there is a world of difference between what the Constitution does not require, and what it prohibits:

"[S]ubtleties almost too contemptible for refutation have been adopted to countenance the surmise that a thing, which is only *not provided for*, is entirely *abolished*. Every man of discernment must at once perceive the wide difference between *silence* and *abolition*."

FEDERALIST No. 83 at 558 (Hamilton) (emphasis in original).¹⁷

¹⁷ That States did not themselves include term limits in the qualifications they added reflects simply that "rotation" was contro-

C. Original Laws Reflect Original Understanding.

The Solicitor General dismisses in a footnote the only unambiguous evidence—the States' contemporaneous enactments adding qualifications—calling them “not reliable indicators.” S.G. Br. 16 n.11.¹⁸ One respondent (also in footnote) proposes a rule that “it is only the actions of the First Congress, not those of early state legislatures,” that count, Th. Br. 33 n.30—even though Congress, which could have disallowed such laws, never did so. Other respondents simply say the state laws “were indeed unconstitutional” and call them “mistakes.” Hill Br. 20. Remarkably, eight of the thirteen original States, they say, forgot about the Constitution. *Id.*; see USTL Br. 8a-18a.¹⁹

The First Congress—whose actions respondents do concede are significant, Th. Br. 33 n.30—passed laws

versial, and any State that went that way alone might disadvantage itself; hence the complaints that the Constitution did not make term limits national. *Cf. Ex parte Yarbrough*, 110 U.S. 651, 660-61 (1884) (districts). Several state laws on congressional incumbency do not take effect until a stated number of other States adopt similar provisions. *E.g.*, Wash. Laws of 1993, ch. 1, § 8; Mo. Const., art. III, § 45(a); Nev. Const., art. II, § 10.4; Alaska Stat. § 15.30.130(a).

¹⁸ But see *McPherson v. Blacker*, *supra*, 146 U.S. at 27: “Certainly plaintiffs in error cannot reasonably assert that the clause of the Constitution under consideration so plainly sustains their position as to entitle them to object that contemporaneous history and practical construction are not to be allowed their legitimate force”

¹⁹ Citing no authority, respondents speculate that when Virginia a quarter-century later repealed property and district-residency requirements, it might have acted from constitutional doubts. Hill Br. 19. History shows on the contrary that property tests of all kinds began to be eliminated during those years as a more egalitarian era dawned. See C. WILLIAMSON, *AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY 1760-1860* 182-207 (1960); Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 358 (1989). Respondents produce no evidence that anyone ever questioned state power to enact these laws until a partisan seating dispute arose in 1807, which ended inconclusively. After the seating dispute, Maryland passed a statute remaining in effect until 1896 that required its Senators be chosen one from each shore. Md. Act of Jan. 6, 1810, ch. 22, § 2.

that disqualified for various offenses. Representative Madison of Virginia voted for them. See USTL Br. 30-32. Respondents are driven to argue that those laws did not mean what they said, and that those legislators must have had in mind an exception for Senators and Representatives, Hill Br. 23, even though such was never mentioned.²⁰

D. Expectations.

Respondents observe, apparently with dismay, that if States can bar longtime officeholders from the ballot, then States can bar convicted felons, too. Hill Br. 33. Would exclusion of felons really have horrified the Framers and ratifiers? On the contrary, surely they would have recoiled instead from any suggestion that the new Constitution had *sub silentio* decreed the opposite. In fact, a reason Jefferson concluded state-enacted qualifications logically must be permissible, was that otherwise one would be driven to the absurd (he thought) conclusion that States could not disqualify “a lunatic, a pauper, a convict of treason, of murder, of felony, or other infamous crime.”²¹

²⁰ One respondent refers to a dictum in *Burton v. United States*, 202 U.S. 344, 369-70 (1906), to the effect that Senators did not hold office under the United States, and construing a much later statute. Tr. Br. 32. But if “any office of honour, trust or profit under the United States,” 1 Stat. 117, was meant to exempt Members of Congress, then the prohibition in Article VI of religious tests for “any Office or public Trust under the United States” did not apply to Congress, either, nor would the impeachment punishment in Article I, § 3, prevent service in Congress. See also E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 33-34 (1957).

²¹ 11 WORKS OF THOMAS JEFFERSON 380 (P. Ford ed. 1905). Respondents accurately point out that Jefferson (like Justice Story) could make mistakes, and that he was in Paris in 1787. Hill Br. 21; Th. Br. 25 n.25. Joseph Story that year was in Marblehead, Massachusetts and was eight years old. Jefferson's analysis was sufficiently compelling for Story to try to deal with it. See 2 J. STORY, *COMMENTARIES* § 624 (1833). Brilliant as he was, Justice Story was far from a neutral observer on issues of state power. See G. WHITE, 3 *HISTORY OF THE SUPREME COURT* 100-05 (1988).

At the ratifying conventions, the new Constitution was attacked relentlessly for encroachments on the States; yet respondents point to no one at all who complained that Article I by implication would prevent States from regulating qualifications.²² Delegates were deeply upset by the controversial grant of power to Congress in Article I, § 4, to override state election laws. See Th. Br. 45. One may imagine their consternation had they believed that the new Constitution would already be doing so: that it not only omitted a "rotation" requirement, but, without bothering to say so, also terminated each State's power to enact one for itself—or to enact property requirements, or district residency requirements, or bans on felons or lunatics, or the many other subjects of state election legislation. Had they believed the Constitution meant that, one may well doubt whether the Constitution—whose ratification was a close-run thing—would have carried at all.

V. THE CONSTITUTION AFFIRMATIVELY GRANTS POWER.

A. Article I, § 2, and the Seventeenth Amendment Broadly Grant Power.

Amendment 73 was adopted directly by the voters of Arkansas themselves. Their power to do so has a separate source in Article I, § 2, which provides for Representatives to be "chosen" every second year "by the People of the several States"—i.e., the people within each State. USTL Br. 46 n.65. "[C]hosen" is not limited to general elections. *United States v. Classic, supra*. The people of Arkansas chose here. They can choose again, whenever they vote for candidates (no candidate is disqualified), as well as whenever they may decide by simple majority to revoke Amendment 73. See Ark. Const., amend. 7; USTL Br. 46; MSLF Br. 5-10. The allocation

²² The complaint in a ratifying convention that respondents quote, Hill Br. 17 n.28, that "there is no controul left in the state governments," referred only to Congress' taxing power. 3 THE COMPLETE ANTI-FEDERALIST 162. In fact, it later complained that Congress could use its § 4 power to control the results of elections. *Id.* at 163.

to the people of each State of power to choose the House was at the heart of this Court's decision in *Wesberry v. Sanders*, 376 U.S. 1 (1964).

Respondents, to explain away this distinctive fact that the people chose, argue that the people of the State as a whole cannot bind the election choices of every district (even though Amendment 73 overwhelmingly won in every district). Th. Br. 49-50; S.G. Br. 15-16. But besides ignoring the Senate, that amounts to saying that the Constitution requires House voting by districts, which plainly it does not. See *Wesberry v. Sanders, supra*, 376 U.S. at 8. Moreover, Article I, § 2, even without the initiative aspect present here, is a separate grant of state power even to legislatures. *United States v. Classic, supra*, 313 U.S. at 311, 315; USTL Br. 8.

B. Article I, § 4, Broadly Grants Power.

The Solicitor General proposes a syllogism that (1) any state power to adopt Amendment 73 must come from § 4, which is also the source of power for Congress; (2) § 4 does not empower Congress to add qualifications; (3) therefore the States cannot do so, either. S.G. Br. 21-22.²³

The first premise is incorrect because there is no logical imperative that state and congressional power be identical. Doubts expressed about Congress setting its own qualifications do not apply to the States, USTL Br. 39, and the States do not require § 4 as a source of power: Arkansas and its people have constitutional power in addition under both Article I, § 2, and the Tenth Amendment. Section 4 was needed, however, to permit Congress to exercise any power at all.²⁴

²³ The Solicitor General is mistaken when he suggests that petitioners rely solely on § 4, or that they would agree that it did not grant congressional power. On the contrary, see USTL Br. 5, 8-14, 30-38, 44-46. Although doubted by some at the Convention, Congress' power has been exercised since 1789 and is identified in *Buckley v. Valeo* and not excluded in *Powell*. See pp. 12, 16-17, *supra*.

²⁴ Madison described Article I as "leav[ing]" regulation of elections to the States, subject to Congress. 3 ELLIOT 367. See also

The second premise also is incorrect. Section 4's "words of great latitude," 2 FARRAND 240, allowed laws "comprehensive and complete." *United States v. Gradwell*, 243 U.S. 476, 483 (1917); see also USTL Br. 8-11. "The truth of the matter is that no limits were discerned in the authority granted," "the almost limitless power which practically everyone assumed Congress had been granted." Paschal, *The House of Representatives*, 17 LAW & CONTEMP. PROB. 276, 280, 283-84 (1952). See also *Buckley v. Valeo*, 424 U.S. 1, 13, 133 (1976) (suggesting § 4 as source of any congressional power to add qualifications).

As applied to Congress, however, the broad grant of power in § 4 is constrained by limitations that do not affect Amendment 73. For instance, an act of Congress that barred reelection of longtime incumbents would risk violating the guarantee of Article I, § 2, and the Seventeenth Amendment that it is the people of each State who choose their representatives, as well as the Tenth Amendment protections of federalism recognized in *Gregory v. Ashcroft*, *supra*, and *New York v. United States*, 112 S. Ct. 2408, 2418 (1992). See USTL Br. 45-46. In any First and Fifth Amendment challenge, the interest of Congress in restricting State choice could be less compelling than that of the people of a State themselves in making their own decision about how their representatives should be elected.²⁰ Although abundant historical practice supports Congress' power to add disqualifications, the limitations on congressional power are not at issue here.

CONCLUSION

The judgment should be reversed.

id. 10 (Nicholas): "the powers vested by this plan in Congress are taken from the state legislatures" instead of being "left solely to the states." Even if § 4 were the only grant of state power, there would be two possibilities: either § 4 assigned only part of the election power, in which case the balance, under the Tenth Amendment, remained with the States; or § 4 fully disposed of the election power, thus assigning all to the States in the first instance, with all also subject to Congress. Either way, Amendment 73 would be constitutionally authorized.

Respectfully submitted,

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IN THE
Supreme Court of the United States OF THE CLERK

OCTOBER TERM, 1994

U.S. TERM LIMITS, *et al.*,
v. *Petitioners,*

RAY THORNTON, *et al.*,
Respondents,

STATE OF ARKANSAS ex rel. WINSTON BRYANT,
Attorney General of the State of Arkansas,
v. *Petitioner,*

BOBBIE E. HILL, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of Arkansas

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TABLE OF CONTENTS

	Page
ARGUMENT	1
I. AMENDMENT 73 IS A LAWFUL BALLOT ACCESS RESTRICTION	4
II. AMENDMENT 73 ALSO IS LAWFUL EVEN IF IT IS DEEMED A TERM LIMIT	11
CONCLUSION	16

TABLE OF AUTHORITIES

Cases:

	Page
<i>Air Courier Conference v. United Postal Workers Union</i> , 498 U.S. 517 (1991)	16
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	5
<i>Burdick v. Takushi</i> , 112 S. Ct. 2059 (1992)	5
<i>Chisom v. Roemer</i> , 501 U.S. 380 (1991)	15
<i>Gomillion v. Lightfoot</i> , 364 U.S. 339 (1960)	6
<i>Guinn v. United States</i> , 238 U.S. 347 (1915)	6
<i>Harrison v. PPG Indus.</i> , 946 U.S. 578 (1980)	15
<i>Hernández v. New York</i> , 111 S. Ct. 1859 (1991)	8
<i>Hunter v. Underwood</i> , 471 U.S. 222 (1985)	5
<i>INS v. Chadha</i> , 462 U.S. 919 (1983)	12-13
<i>Kokkonen v. Guardian Life Ins. Co.</i> , 114 S. Ct. 1673 (1994)	16
<i>Lee v. Weisman</i> , 112 S. Ct. 2649 (1992)	10
<i>Maloney v. McCartney</i> , 223 S.E. 2d 607 (W. Va.), appeal dismissed for want of a substantial federal question <i>sub nom.</i> , <i>Moore v. McCartney</i> , 425 U.S. 946 (1976)	6
<i>New York v. United States</i> , 112 S. Ct. 2408 (1992)	13
<i>New York Trust Co. v. Eisner</i> , 256 U.S. 345 (1921)	7
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969)	3, 9, 14, 15, 16
<i>Public Citizen v. United States Dep't of Justice</i> , 491 U.S. 440 (1989)	16
<i>Rice v. Santa Fe Elevator</i> , 331 U.S. 218 (1947)	13
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	3, 9
<i>Sun Oil v. Wortman</i> , 486 U.S. 717 (1988)	11
<i>Thorsted v. Gregoire</i> , 841 F. Supp. 1068 (W.D. Wash. 1994), appeals pending <i>sub nom.</i> <i>Thorsted</i> <i>v. Munro</i> , Nos. 94-35222 <i>et al.</i> (9th Cir.), cert. before judgment denied <i>sub nom.</i> <i>Citizens for</i> <i>Term Limits v. Foley</i> , 114 S. Ct. 2727 (1994)	8
<i>United States v. City of Houston</i> , 800 F. Supp. 504 (S.D. Tex. 1992)	7
<i>United States Dep't of Commerce v. Montana</i> , 112 S. Ct. 1415 (1992)	6

TABLE OF AUTHORITIES—Continued

	Page
<i>Constitution and Statutes:</i>	
U.S. Constitution Article I, § 8, Cls. 1, 4 and 17	12
Article I, § 10, Cls. 1-3	12
2 U.S.C. § 2(c) (1988)	13
2 U.S.C. §§ 123b, 123b-1 (West Supp. 1994)	8
<i>Miscellaneous:</i>	
Mildred L. Ames, <i>Black Members of the United</i> <i>States Congress, 1789-1991</i> (CRS Report May 10, 1991)	10
Mildred L. Ames, <i>Women in the United States</i> <i>Congress</i> (CRS Report July 6, 1993)	10
<i>The Anti-Federalist Papers and The Constitutional</i> <i>Convention Debates</i> (R. Ketcham ed. 1986)	9
Bernard Bailyn, ed., <i>The Debate on the Constitu-</i> <i>tion</i> (1993)	13
<i>Colony Laws of Virginia, 1619-1660</i> (J. Cushing ed. 1978)	10
<i>The Federalist</i> No. 4 (J. Madison) (C. Rossiter ed. 1961)	13
O.W. Holmes, <i>The Common Law</i> (1981)	7
James H. Kettner, <i>The Development of American</i> <i>Citizenship, 1608-1870</i> (1978)	10
Mark P. Petracca, <i>Restoring "The University of</i> <i>Rotation": An Essay in Defense of Term Limi-</i> <i>tation, in The Politics and Law of Term Limits</i> (E. Crane & R. Pilon eds. 1994)	14
<i>Politics in America, 1994: The 103d Congress</i> (P. Duncan ed. 1993)	7
Donald W. Rogers, <i>Voting and the Spirit of Ameri-</i> <i>can Democracy</i> (1992)	10
<i>Women in the United States Senate, Senate His-</i> <i>torical Office</i> (from U.S. Congress, <i>Women in</i> <i>Congress</i> , H.R. Doc. No. 238, 101st Cong. 2d Sess. 1991)	7

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1456

U.S. TERM LIMITS, *et al.*,
Petitioners,
v.

RAY THORNTON, *et al.*,
Respondents,

No. 93-1828

STATE OF ARKANSAS ex rel. WINSTON BRYANT,
Attorney General of the State of Arkansas,
v. Petitioner,

BOBBIE E. HILL, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of Arkansas

REPLY BRIEF FOR THE STATE PETITIONER

Respondents¹ and their amici misread the provision of Amendment 73 before the Court and treat it as if it imposed an absolute bar to continued officeholding by congressional incumbents. Respondents' and amici's par-

¹ We use the term "respondents" to refer to those respondents supporting the judgment below.

allel arguments run as follows: The Qualifications Clauses bar the States from limiting the terms of Representatives and Senators; Amendment 73, despite its clear text, is not materially different from a term limit; Amendment 73 therefore is invalid under the Qualifications Clauses. That is so, they contend, even though Amendment 73 permits a long-term incumbent to be elected as a write-in candidate.

The principal flaw in respondents' and amici's position is their attempt to elide the difference between a term limit and a ballot access restriction, or, put another way, their failure to articulate the difference between a regulation of the federal electoral process and a qualification to hold federal office. That distinction is necessary to any proper analysis of the issues presented by this case, since the Elections and Qualifications Clauses must be read in a manner to accommodate each other. Indeed, that distinction is critical to respondents' and amici's submission, because they would permit States to regulate federal elections as long as a restriction does not become a qualification. Since they do not define a line separating regulations from qualifications, their arguments read like Hamlet without the Prince of Denmark.

By contrast, our interpretation of Article I defines both terms. As we explained in our opening brief, State Br. 28-31, 35, and Representative Dickey *et al.*, explained in theirs, Dickey Br. 11-24, a regulation does not constitute a "qualification" unless it bars a candidate victorious at the polls from holding office as a matter of law. The First, Ninth, and Eleventh Circuits have each endorsed that standard, and we submit that it is the correct one, for several reasons. That standard is identical to dictionary interpretations of the term "qualification" written contemporaneously with the passage of Article I; it is the interpretation that the Framers would have given to the term "qualification," because it is consistent with the use of numerous 18th century voting requirements,

such as property ownership; it is the stated understanding of that term expressed in contemporary publications authored by influential figures such as William Blackstone, James Madison, and Alexander Hamilton, and in the treatise written later by Justice Joseph Story; it is the characterization that this Court gave to that term in decisions such as *Powell v. McCormack*, 395 U.S. 486, 522, 533, 547 (1969), and *Storer v. Brown*, 415 U.S. 724, 746 n.16 (1974); and it permits that term "qualification" to serve as a fit subject for judicial review, because it provides a judicially manageable standard to assess electoral laws. That standard, when applied to this case, shows that Amendment 73 is not a "qualification," because Amendment 73 does not exclude long-term incumbents from office as a matter of law. Accordingly, if this Court agrees with our definition of the term "qualification," the judgment below should be reversed.

By ignoring the actual text and operation of Amendment 73, respondents and amici have failed to address the question at hand: namely, whether the people of a State can attempt to offset the numerous varied advantages of long-term incumbency by making it easier for a voter to cast a ballot for a challenger. The procedure places no greater burden on a long-term incumbent than the one borne by every candidate for the first century of this Nation's existence—convincing voters to write in the incumbent's name for office. As we explained in our opening brief, State Br. 31-33, write-in procedures were used in voting for more than 100 years in this country, and Arkansas constitutionally could use that procedure today in lieu of polling booths for every federal election. Neither respondents nor their amici argue to the contrary. The result is this: Amendment 73 requires resort to a plainly constitutional voting procedure for a limited category of individuals—long-term incumbents—who, by definition, have proved their ability to attract voting support and are not entitled to special protection from the majoritarian political process. The question

here, accordingly, ultimately becomes whether *that* difference in the treatment afforded long-term incumbents violates the text of Article I. And it is with that question in mind that we reply to respondents' and their amici's specific arguments.

I. AMENDMENT 73 IS A LAWFUL BALLOT ACCESS RESTRICTION

A. Respondent Thornton and the Solicitor General maintain that Amendment 73 should be treated as a strict term limitation because its purpose and effect is to unseat long-term incumbents. In their view, the people of a State cannot impose a term limit on their own representatives in Congress. Because the ballot access restrictions of Amendment 73 were designed for the same purpose, and inevitably will have the same effect, as a term limit, they argue, Amendment 73 also is unconstitutional. Since there is no material difference between exclusion from office and exclusion from the ballot, they maintain, Amendment 73 is invalid. Thornton Br. 37-44; U.S. Br. 23-25. That argument is flawed in several respects.

1. We agree that, as a factual matter, the purpose of Amendment 73 (to put it accurately) is to increase the likelihood of rotation in office because of the harms that entrenched incumbency can wreak on the political process. Ark. Const. Amend. 73 Preamble, *quoted at* State Br. 4a; State Br. 4, 26-27. But that intent hardly renders Amendment 73 invalid.

The intent animating government action generally is irrelevant for Article I purposes. Good intentions do not justify exceeding constitutional limitations, and bad intentions do not invariably translate into a trespass on constitutionally-protected freedoms. The Equal Protection Clause is the principal exception to that general rule. It renders invalid otherwise permissible state action undertaken with (for example) racially discriminatory intent, because that provision seeks to eliminate racism, a state of mind, from

government activity. Accordingly, it is not surprising for the Equal Protection Clause to be concerned with the purpose for government action, including legislation. See *Hunter v. Underwood*, 471 U.S. 222 (1985). But legislative intent should be irrelevant for purposes of the Qualifications Clauses, just as it is irrelevant to the Ex Post Facto Clauses. On the one hand, if the Clauses define only the minimum qualifications for federal office, as we have argued, the States can add new ones, thereby excluding some additional candidates. If so, the purpose for unseating such candidates is immaterial. On the other hand, if the Clauses define the exclusive qualifications for federal office, the only pertinent question is whether *in fact* a law prevents a candidate from holding office. In that case, too, the purpose for such a law is irrelevant.² The intent of Amendment 73 thus should be immaterial to its constitutionality, under our theory or respondents'.

To be sure, legislative intent is relevant for purposes of determining whether Amendment 73 violates the First and Fourteenth Amendments. In that context, ballot access restrictions must, *inter alia*, promote a legitimate government interest, see *Burdick v. Takushi*, 112 S. Ct. 2059, 2063 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), and legislative purpose is relevant in that regard. Amendment 73 easily passes that test. As we noted in our opening brief, State Br. 18-27, 33-34 n.38, and Congressmen Dickey and Hutchinson detailed, Dickey Br. 24-36, Amendment 73 seeks to offset the numerous unfair advantages enjoyed by long-term incumbents in order to increase

² For example, under our submission a statute requiring write-in voting for *all* candidates does not impose a qualification for federal office, even if the legislature's avowed purpose was to make reelection difficult for long-term incumbents, since a uniform write-in procedure excludes no one from office. Moreover, under respondent's theory a law barring prisoners from serving in Congress would be unconstitutional, even though the purpose of the law was to ensure that whoever was elected actually could attend sessions in Washington, D.C.

the competitiveness of elections and, ultimately, help assure the benefits of representative government through more frequent rotation of officeholders. History shows that rotation in office has long been a desirable way to achieve a vibrant democracy, State Br. 21-27, and this Court's decisions show that States have a compelling interest in assuring that elections remain open, competitive, and fair. Dickey Br. 33. Indeed, this Court already has held that States may impose term limits on state officers, see *Maloney v. McCartney*, 223 S.E.2d 607 (W. Va.), appeal dismissed for want of a substantial federal question *sub nom. Moore v. McCartney*, 425 U.S. 946 (1976) (upholding two-term limit for governor), and the reasons why States may adopt such laws apply in this context, too. Accordingly, to the extent that the purpose of Amendment 73 is relevant to its constitutionality, that inquiry is required only by the First and Fourteenth Amendments, not the Qualifications Clauses. In any event, Amendment 73 passes that test with flying colors.

There is utterly no merit to the Solicitor General's offensive implication that Amendment 73 resembles the type of racially-motivated legislation considered in cases like *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), which involved racially-motivated gerrymandering, and *Guinn v. United States*, 238 U.S. 347 (1915), which involved a "grandfather clause" exemption from a literacy test requirement for voting. In those cases, the States sought to dress racially-discriminatory actions in racially-neutral clothing by raising justifications for their laws that upon close examination proved to be a sham. In this case, by contrast, the people of Arkansas purposefully sought to increase rotation in office to achieve its benefits while steering clear of the Qualifications Clauses. In a compromise that would have been well received by the Framers, who themselves were the "masters of compromise," *United States Dep't of Commerce v. Montana*, 112 S. Ct. 1415, 1429 (1992), the people of Arkansas tried to achieve the benefits of rotation without foreclosing anyone from holding office if the voters so desired. Amendment 73

may not be constitutional (although we believe that it is), but it certainly is not even remotely pretextual.³

2. Respondents and amici also err in asserting that Amendment 73 inevitably will lead to the defeat of long-term incumbents. Although we hope that Amendment 73 will have that effect, only time will tell. After all, Amendment 73 excludes from the ballot only candidates with a proven ability to win elections. Perhaps they will prevail despite Amendment 73; perhaps not. Oftentimes, experience is worth more than logic, *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921); O. W. Holmes, *The Common Law* 5 (1881), and this case is no exception. The disadvantages felt by challengers or small, third-party candidates who are excluded from the ballot, see, e.g., U.S. Br. 24, hardly apply to long-term incumbents, particularly in a State like Arkansas, where the voters are overwhelmingly registered for one party. And it is naive (at best) to claim that Arkansas voters would not have known that Senators J. William Fullbright and John McClellan lacked the "endorsement" and "support" of the Democratic Party even if they had been excluded from the ballot due to Amendment 73. *Id.*⁴ Even today's

³ Indeed, one of the benefits of increasing rotation in office would be an enhanced possibility for women and minorities to serve in office. See *United States v. City of Houston*, 800 F. Supp. 504, 507 (S.D. Tex. 1992) (before it required a special election, the Justice Department should have considered city council term limits approved by voters as an effective means of increasing minority opportunities). Historically, virtually all of the women and minorities who have been elected to either the House or the Senate were first elected in open seats. See *Politics in America, 1994: 108d Congress* (P. Duncan ed. 1993); *Women in the United States Senate*, Senate Historical Office (from U.S. Congress, *Women in Congress*, H.R. Doc. No. 238, 101st Cong. 2d Sess. (1991)).

⁴ Amici California Democratic Party *et al.* argue that laws like Amendment 73 violate the First and Fourteenth Amendments by preventing political parties from nominating a candidate. California Dem. Party Br. 12-28. Amendment 73, however, applies only to the general election; it does not prevent any party from nominating

incumbents have publically-funded media facilities and heightened name recognition, *e.g.*, 2 U.S.C. §§ 123b, 123b-1 (West Supp. 1994); State Br. 26; U.S. Term Limits Br. 19-20 & n.25; State of Washington Br. app. A1-A15, which offset the burden of having to persuade voters to write in their names. The upshot is that experience under Amendment 73 may reveal that long-term incumbents are re-elected nonetheless. Since that may turn out to be the case, it is wrong to maintain that Amendment 73 necessarily will have the same effect as a term limit.

Respondents also rely on the Arkansas Supreme Court's statement that write-in candidates have only a "glimmer[] of opportunity" to succeed, claiming that this statement constitutes a factual finding that supports their submission. Pet. App. 15a.⁶ The statement, however, is a ruling of law, not a factual finding. To support that statement, the Arkansas Supreme Court cited a federal district court decision on summary judgment in another case, *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994), appeals pending *sub nom. Thorsted v. Munro*, Nos. 94-35222 *et al.* (9th Cir.), cert. before judgment denied *sub nom. Citizens For Term Limits v. Foley*, 114 S. Ct. 2727 (1994), not the record in this case, Pet. App. 15a, which, as U.S. Term Limits has shown, would not support any such factual finding, U.S. Term Limits Br. 17-25. And the district court in *Thorsted* committed the same mistake as the court below, relying on this Court's statements, made in the very different context of third-party candidates, that exclusion from the ballot effectively excludes

any candidate in the primary process or from endorsing one at the general election.

⁶ Respondent Thornton also argues that this factual finding is not subject to review by this Court, Thornton Br. 40, but that claim is meritless. This Court has the power to review state court factual findings made in connection with constitutional issues. *Hernandez v. New York*, 111 S. Ct. 1859, 1869-71 (1991) (plurality opinion) (collecting cases).

one from office. As we have shown, that prediction cannot be made in this case. In any event, this Court sustained a ballot access regulation in *Storer*, 415 U.S. at 746 n.16, even though it excluded a person from the ballot for federal office. *Storer* thus proves that an otherwise valid ballot-access regulation is not rendered unconstitutional simply because it has an exclusionary effect.

B. Respondents Hill *et al.*, criticize Amendment 73 on the ground that it violates "the Powell principle," Hill Br. 31, which they describe, quoting Alexander Hamilton, as the tenet that "the people should choose whom they please to govern them," Hill Br. 9 (quoting *Powell*, 395 U.S. at 547; citation and internal punctuation omitted). See Hill Br. 32 (quoting James Madison for the proposition that "the door to service in Congress was to be open to merit of every description" and "[n]o qualification of wealth, of birth, of religious faith, or of civil profession, is permitted to fetter the judgment or disappoint the inclination of the people"). Hamilton's and Madison's statements, however, only reveal that the Constitution itself does not bar individuals from holding office. Those statements do not show that the States could not add additional qualifications, and they have not been so construed. Congress and the States, for instance, have barred felons from holding state and federal offices since 1661, State Br. 9 & n.5, 43 & n.46; U.S. Term Limits Br. 25-31, and Thomas Jefferson believed that the States retained that authority by virtue of the Tenth Amendment, State Br. 15. It also is unfair to Hamilton and Madison to read their remarks literally. There were numerous contemporary instances in which "qualification[s] of wealth * * * [or] birth" *did* exclude a sizeable number of people. *E.g.*, *The Anti-Federalist Papers and the Constitutional Convention Debates* 9 (Ralph Ketcham ed. 1986) ("property qualifications for voting and office-holding were common, and women were barred from doing either"); State Br.

42.⁶ Hamilton and Madison doubtless were aware of that fact; perhaps they, like Homer, nodded. Cf. *Lee v. Weisman*, 112 S. Ct. 2649, 2674 n.5 (1992) (Souter, J., concurring). A better construction of their statements, however, is that the federal Constitution did not bar such individuals from federal office, rather than that the Constitution guaranteed everyone but those specifically excluded the opportunity to hold federal office.

Despite the respondents' dissatisfaction with Amendment 73, it reflects the choice of the people of Arkansas.

⁶ See also, e.g., Donald W. Rogers, *Voting and the Spirit of American Democracy* 3, 5, 6, 21 ("[a] second major qualification [beyond being an adult white male] is that in some colonies, a two-tier system of elections—with more property required for voting for higher offices—separated local contests from colony-wide contests" [; e.g., State Br. 21b-22b]), 22 ("Women did not vote, could not be voters, could not hold office and only very, very rarely participated in politics at all.") (footnote omitted), 24 ("all the colonies restricted voting to Protestant Christians"), 24 ("I have included the word white out of convention. Few colonies legislated American Indians or Negroes out of the suffrage. Nevertheless, no instances of blacks or Indians voting have been discovered in the northern colonies, and one would assume that convention kept them from the polls. It is clear, however, that Negroes did vote in Virginia, North and South Carolina, but in those places, as well as in Georgia, laws essentially forbade the practice.") (footnote omitted), 26 ("Efforts to include blacks and women [as voters] got nowhere before the Civil War, and indeed it was not until Wyoming was admitted to the Union in 1890 with female suffrage that the women's suffrage movement had any success at all.") (footnote omitted) (1992); 1 *Colony Laws of Virginia, 1619-1660*, at xix-xx (John D. Cushing ed. 1978); James H. Kettner, *The Development of American Citizenship, 1608-1870*, at 215-19 (1978). Because neither women nor blacks were permitted to vote, there were no women or black members of Congress. See, e.g., Mildred L. Ames, *Black Members of the United States Congress, 1789-1991* (CRS Report May 10, 1991); Mildred L. Ames, *Women in the United States Congress* (CRS Report July 6, 1993). The fact that Article I of the Constitution has never specifically forbidden the election of women and blacks to Congress does not obviate the reality that those classes of citizens were ineligible to be elected to Congress, were not elected and did not serve until the pertinent state laws were changed or superseded.

The people have chosen who will govern them—and for how long. Thus, the enterprise begun by Hamilton and Madison continues to allow the people to choose.

C. Finally, respondents Hill *et al.* argue that Amendment 73 cannot be defended as a ballot access regulation, because a state cannot exclude from the ballot a candidate who satisfies the necessary qualifications. Hill Br. 32-40. None of the reasons given by respondents, however, is persuasive.

For instance, respondents argue that the Elections Clause authorizes the State to regulate only procedural aspects of federal elections, not the substantive electoral criteria. Hill Br. 33, 35. Yet, "the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn." *Sun Oil v. Wortman*, 486 U.S. 717, 726 (1988). That maxim applies in this case, too. This Court in *Storer* upheld a state law excluding from the ballot as an independent candidate anyone who lost in the primary or was registered in a political party, and the Court in *Burdick* sustained a state law that altogether prohibited write-in votes. Both laws were substantive regulations of the electoral process. Respondents maintain that if States can exclude otherwise qualified candidates from the ballot, States can "circumvent the entire notion of a Congress 'open to merit of every description.'" Hill Br. 33. That "notion" is more fiction than fact, however, as we have shown above. Respondents assert that no decision supports our interpretation of the Elections Clause. Hill Br. 35. But *Storer* and *Burdick* do support our submission.

II. AMENDMENT 73 ALSO IS LAWFUL EVEN IF IT IS DEEMED A TERM LIMIT

A. We argued in our opening brief that the text of the Constitution itself shows that the Qualifications Clauses are not exclusive, for several reasons. State Br. 36-39. *First*, the most natural reading of their text is

that they set minimum, not maximum, requirements. *Second*, the Framers knew how to draft a provision that established "uniform" or "exclusive" requirements, because the Framers used those terms elsewhere in Article I. See Art. I, § 8, Cls. 1, 4, and 17. *Third*, the Qualifications Clauses need not be read as uniform in order to be internally coherent, since the clauses refer to citizenship and inhabitancy, concepts that were defined by state law in 1789. *Fourth*, related constitutional provisions, such as the Incompatibility Clause, Oath or Affirmation Clause, and Religious Test Clause, show that the Qualifications Clauses are not exclusive, since those companion provisions also deal with this subject. *Fifth*, other provisions of Article I, such as the Ex Post Facto Clause, Bill of Attainder Clause, and Contract Clause, § 10, Cls. 1-3, show that the Framers knew how expressly to bar the States from enacting certain types of legislation, since those provisions *in haec verba* state that "[n]o State shall" undertake certain actions, including the "pass[age]" of specific laws. *Sixth*, the Tenth Amendment requires that doubts as to whether States have particular types of authority should be resolved in the States' favor. Those various propositions, each of which rests on the text of the Constitution, provide a compelling case that States can impose additional qualifications on federal officeholders.

Respondents Hill *et al.* and the Solicitor General do not discuss the constitutional text at all. Hill Br. 6-27; U.S. Br. 6-16. Respondent Thornton does, but he gets it backwards. In his view, Article I comprehensively regulates the federal electoral process, "pre-empt[ing]" States from supplementing that process through additional qualifications absent an "express delegation of authority" to do so. Thornton Br. 11.⁷ The Framers, however, had

⁷ The Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), does not support respondent Thornton's argument. See Thornton Br. 10. The Court in *Chadha* made the point (quoted by Thornton) that the bicameralism and presentment requirements of Article I

a quite different view of how the Tenth Amendment works. See *The Federalist* No. 4, at 292-93 (J. Madison) (C. Rossiter ed. 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."); James Wilson's Speech at a Public Meeting (Oct. 6, 1787), reprinted at 1 Bernard Bailyn, *The Debate on the Constitution* 64 (1993) ("every thing which is not given, is reserved"). Respondent's theory confuses statutory preemption doctrine with the Tenth Amendment. Compare, e.g., *Rice v. Sante Fe Elevator*, 331 U.S. 218, 230 (1947), with, e.g., *New York v. United States*, 112 S. Ct. 2408, 2417 (1992). It is the Tenth Amendment that provides the rule of decision here, and it preserves to the States powers not granted to the federal government nor denied to the States. Accordingly, there is no merit to respondent Thornton's argument that Article I implicitly bars the States from doing what they are not, and were never, explicitly prohibited from doing.⁸

B. Respondents and amici rely heavily on various statements made contemporaneously with the drafting and enactment of the Constitution to support their claim that the Qualifications Clauses are exclusive. Thornton Br. 12-34; Hill Br. 11-18, 21-22; U.S. Br. 7-15; Hyde Br. 4-25.⁹ The Court noted in *Powell*, however, that those

were not merely "an abstract generalization." 462 U.S. at 436. *Chadha* did not involve the Qualifications Clauses.

⁸ What is more, if the Constitution pre-empts supplemental State regulation, however, it also pre-empts supplemental federal regulation. There is no reason to distinguish the federal and state governments in this regard, and respondent Thornton offers none. But if that is so, then Congress cannot require that House elections be held by district, rather than at-large, 2 U.S.C. § 2(c) (1988), since Article I does not "express[ly] delegat[e that] authority" to the federal government.

⁹ In that regard, respondents Hill *et al.* and amicus Hyde rely on the John Wilkes episode in England as authority for the proposi-

materials do not answer this question, explaining that "the debates are subject to other interpretations." 395 U.S. at 532 (footnote omitted).¹⁰ What is more, as we already explained, State Br. 13-14, 43, Congress and the States began to adopt qualifications for federal officeholders shortly after the Constitution became law. Those actions demonstrate that the Framers and their contemporaries saw no constitutional infirmity in federal and State-imposed qualifications atop the ones specified in Article I.

But respondents' and amici's claim also is unpersuasive in its own terms. Neither respondents nor their amici cite a single statement by anyone present at the Constitutional Convention or state ratifying conventions, or writing contemporaneously with those events, that States were prohibited from imposing term limits on federal officers. That silence is particularly significant in light of two facts: (a) States clearly have, and frequently had exercised, the power to impose, for example, property qualifications on state officeholders, see State Br. App. 1b-34b, and (b) critics of the Convention's handiwork advanced

tion that voters must be left free to elect whomever they wish. Hill Br. 8, 12; Hyde Br. 4-6. The Wilkes case, however, is irrelevant. Wilkes was expelled from (and declared ineligible for later membership in) Parliament for criticizing a peace treaty with France, resolutions later expunged. *Powell*, 395 U.S. at 527-31. The lesson that the Framers would have taken from the Wilkes affair, according to *Powell*, was that the power to judge qualifications did not include "the right to exclude members-elect for general misconduct not within *standing qualifications*." *Id.* at 528 (emphasis added). In other words, each House could not expel an otherwise qualified Member unless he violated a rule set forth in positive law. But term limits would be "standing qualifications" as this Court used that phrase in *Powell*, so Wilkes' case offers no support for the ruling below.

¹⁰ For a response to the argument that Hamilton's views reflect the Framers' general understanding of the Qualifications Clauses, see Mark P. Petracca, *Restoring "The University in Rotation": An Essay in Defense of Term Limitation*, in *The Politics and Law of Term Limits* 57 (Edward H. Crane & Roger Pilon eds. 1994).

every conceivable argument in opposition to the Constitution. If Article I left the people of the States bereft of the power to set qualifications for their new delegates, such as excluding felons and the mentally incompetent, someone would have noticed it. No one did, since Article I did not have that effect. Under these circumstances, the Framers' silence alone is quite significant. Cf. *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.") (quoting *Harrison v. PPG Indus.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting)).

C. Respondents and amici claim that *Powell v. McCormack*, 395 U.S. 486 (1969), prohibits States from adopting term limits. As we have explained, however, State Br. 44-45, the holding in *Powell* does not reach this case. The Court's lengthy discussion in *Powell* of justiciability dealt with the same danger raised by the Wilkes case: the refusal of a democratic body to seat a duly elected member. The Framers and the Court in *Powell* had in mind the fear that an elite institution would exclude popularly elected non-conformists. To avoid that possibility, the Court recognized that the power to judge qualifications must be circumscribed by well-defined criteria existing as positive law, lest the two-thirds expulsion power become superfluous. 395 U.S. at 547-49. The power of Arkansas' citizens to choose who is qualified to represent them as duly elected members of Congress poses no danger that cannot be remedied by the First and Fourteenth Amendments in justiciable cases.

The statements cited by respondents and amici from the Court's decision in *Powell* must be read in the factual context presented by that case, which included the fact that Mr. Powell was qualified under federal and state law to

hold his seat in the House.¹¹ Respondents Hill *et al.* claim that Powell endorsed the "principle" that the people should be free to elect whomever they choose. Hill Br. 9, 31-33. Yet, respondents reify the principles underlying that decision to a level far above what was necessary to decide that case. In that respect, the problem with "principles" is akin to the problem with "spirits": viz., "they tend to reflect less the views of the world whence they come than the views of those who seek their advice." *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring in the judgment).

CONCLUSION

The judgment of the Supreme Court of Arkansas should be reversed.

Respectfully submitted,

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¹¹ See, e.g., *Kokkonen v. Guardian Life Ins.*, 114 S. Ct. 1673, 1676 (1994) ("[i]t is to the holdings of our cases, rather than their dicta, that we must attend"); *Air Courier Conference v. United Postal Workers Union*, 498 U.S. 517, 529 (1991) ("This statement, like all others made in our opinions, must be taken in the context in which it was made.").

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DEPOSE IN THE CLERK

Nos. 93-1456 and 93-1828

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

U.S. TERM LIMITS, INC., ET AL.,

Petitioners,

v.

RAY THORNTON, ET AL.

STATE OF ARKANSAS EX REL. WINSTON BRYANT,
ATTORNEY GENERAL OF THE STATE OF ARKANSAS,

Petitioner,

v.

BOBBIE E. HILL, ET AL.

On Writ Of Certiorari
To The Supreme Court Of Arkansas

**REPLY BRIEF FOR RESPONDENTS
REPRESENTATIVE JAY DICKEY AND
REPRESENTATIVE TIM HUTCHINSON
SUPPORTING PETITIONERS**

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TABLE OF CONTENTS

I. AMENDMENT 73 DOES NOT ESTABLISH AN ADDITIONAL QUALIFICATION FOR MEMBERSHIP IN CONGRESS	2
II. AMENDMENT 73 IS A PERMISSIBLE EXERCISE OF STATE AUTHORITY TO REGULATE CONGRESSIONAL ELECTIONS	7
III. AMENDMENT 73 IS ENTIRELY CONSISTENT WITH THE FIRST AND FOURTEENTH AMENDMENTS	13
A. This Court Should Not Address The Claim That Amendment 73 Violates The First Or Fourteenth Amendments	13
B. Amendment 73 Is A Valid Ballot-Access Measure That Does Not Unduly Infringe The Rights Of Voters Or Candidates	14
1. Amendment 73 Is Properly Subjected To Minimal Scrutiny Because It Imposes Only Minor, Non-discriminatory Burdens On The Rights Of Voters And Candidates	14
2. Amendment 73 Serves Important And Legitimate State Interests That More Than Justify Its Minimal Burden On The Rights Of Voters And Candidates	15
C. Amendment 73 Does Not Impose An Impermissible Burden On The Associational Rights Of Political Parties Or Their Members	17
CONCLUSION	19

TABLE OF AUTHORITIES

Cases:

<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	16
<i>ASARCO Inc. v. Kadish</i> , 490 U.S. 605 (1989).....	14
<i>Austin v. Michigan State Chamber of Commerce</i> , 494 U.S. 652 (1990)	17
<i>Clements v. Fashing</i> , 457 U.S. 957 (1982)	15
<i>Lytle v. Household Mfg., Inc.</i> , 494 U.S. 545 (1990)	18
<i>Roudebush v. Hartke</i> , 405 U.S. 15 (1972)	11
<i>Stack v. Adams</i> , 315 F. Supp. 1295 (N.D. Fla. 1970)	5
<i>State ex rel. Handley v. Superior Court</i> , 151 N.E.2d 508 (Ind. 1958)	5
<i>State ex rel. McCarthy v. Moore</i> , 92 N.W. 4 (Minn. 1902)	5
<i>Storer v. Brown</i> , 415 U.S. 724 (1974).....	2,5,8,15
<i>Tashjian v. Republican Party of Conn.</i> , 479 U.S. 208 (1986)	11
<i>Thornburg v. Gingles</i> , 478 U.S. 30 (1986)	6
<i>United Parcel Serv., Inc. v. Mitchell</i> , 451 U.S. 56 (1981)	13,18
<i>United States v. Classic</i> , 313 U.S. 299 (1941).....	8,11
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975)	14
<i>Weber v. Heaney</i> , 995 F.2d 872 (8th Cir. 1993)	17
<i>Zobrest v. Catalina Foothills School Dist.</i> , 113 S. Ct. 2462 (1993)	18
Constitutional Provisions:	
U.S. Const. amend. IX	13
U.S. Const. amend. X.....	13
Ark. Const. amend. 73, § 3(a).....	18

Table of Authorities (Continued)

	Page(s)
Ark. Const. amend. 73, § 3(b)	18
Ark. Const. amend. 73, § 6(b)	18
Statutes, Rules and Regulations:	
2 U.S.C. § 9	8
2 U.S.C. § 453	17
Ark. Code § 7-1-101(4)	18
Ark. Code § 7-5-525(c).....	18
Sup. Ct. R. 24.1(i)	14
Sup. Ct. R. 24.2	14
Sup. Ct. R. 24.3	14
Other Authorities:	
<i>The Debate on the Constitution</i> (B. Bailyn ed. 1993)....	9,10
2 <i>The Debates in the Several State Conventions on the Adoption of the Federal Constitution</i> (J. Elliot ed. 1836).....	10,11
2 <i>The Records of the Federal Convention of 1787</i> (M. Farrand ed. 1911)	8,9
2 J. Story, <i>Commentaries on the Constitution of the United States</i> (1833)	9
N. Webster, <i>An American Dictionary of the English Language</i> (1828).....	2
<i>The Federalist</i> No. 52 (J. Cooke ed. 1961) (J. Madison)	4
<i>The Federalist</i> No. 57 (J. Cooke ed. 1961) (J. Madison)	4

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SUPPORTING PETITIONERS**

Respondents Bobbie E. Hill *et al.* ("Hill") and Ray Thornton ("Thornton") (collectively "respondents") and their *amici* have failed to demonstrate that Amendment 73 establishes an additional qualification for membership in Congress, or that there is any other basis on which to invalidate the Amendment. The judgment below must therefore be reversed.

I. AMENDMENT 73 DOES NOT ESTABLISH AN ADDITIONAL QUALIFICATION FOR MEMBERSHIP IN CONGRESS

As we demonstrated in our opening brief ("Dickey Br." at 11-20), the text, history, and consistent judicial construction of the Constitution compel the conclusion that the term "[q]ualifications" encompasses only those attributes that render an individual legally eligible for membership in Congress and without which a candidate cannot take office even if he or she receives a majority of the votes cast. Respondents do not seriously dispute this proposition.¹ Instead, they contend (Hill Br. 30-32; Thornton Br. 37-44) that the Qualifications Clauses prohibit the States from adopting laws that have the purpose and effect of making it difficult for a particular category of individuals to win reelection,² even if those laws

¹ Indeed, Thornton effectively concedes this point. See Thornton Br. 44. Hill halfheartedly disagrees (Hill Br. 29-30 & n.68), noting that various dictionaries define "qualifications" in part as those attributes that render individuals "capable of being elected" or "capable of any employment." As Hill admits (Br. 29-30), however, Amendment 73 will not *always* lead to the defeat of multi-term incumbents. As a result, the attribute of non-incumbency cannot be deemed a qualification even under Hill's reading of these dictionary definitions, because not all candidates lacking that attribute are "[in]capable of being elected." Moreover, the definitions on which Hill relies plainly use the term "capable" in the sense of "having legal power or capacity" (N. Webster, *An American Dictionary of the English Language* (1828)), thus confirming the historical understanding of "qualifications" as absolute legal prerequisites to office.

² Respondents appear to take the position (see Hill Br. 30; Thornton Br. 38-40) that a law is invalid under the Qualifications Clauses if its "intent" or "purpose" is to prevent a particular class of potential candidates from winning an election. That position finds no support in cases construing the Qualifications Clauses, however, and for good reason: those cases uniformly look to whether a challenged law *establishes* an additional qualification, not to whether it was *intended* to do so. See, e.g., *Storer v. Brown*, 415 U.S. 724, 746 n.16 (1974);

(Footnote continued on following page)

do not actually disqualify anyone from congressional service.³

Respondents' attempt to expand the scope of the Qualifications Clauses in this manner has absolutely no support in the text, history, or judicial construction of the Constitution. Plainly, the actual language of the Clauses does not purport to limit state power in the manner suggested. And even if the mere listing of certain qualifications in the Constitution could somehow be construed to preclude the States from imposing additional ones,⁴ that result would not suggest that the Constitution also bars the imposition of other election regulations that are *not* "[q]ualifications" as that term was used in the Constitution and understood by the Framers.

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cases cited *infra* n.6 and Thornton Br. 37-38 nn. 33-35. Respondent Thornton also errs in contending (Br. 39-40) that this Court is somehow bound by the Arkansas Supreme Court plurality's statement that the "intent" of Amendment 73 was to "disqualify" multi-term incumbents. What constitutes a disqualification within the meaning of the Qualifications Clauses is a question of federal, not state, law.

³ Relying on the comment in the plurality opinion below that write-in candidates have only "glimmers of opportunity" (93-1456 Pet. App. ("Pet. App.") 15a), respondent Thornton contends (Br. 38, 40-42) that Amendment 73 will actually render multi-term incumbents "ineligible" for office and "preclude" them from serving in Congress. That contention is patently false. The decision below does not purport to "find" that multi-term incumbents can never again serve in Congress, only that electoral success for such individuals will likely be hard-won. See Pet. App. 15a (plurality opinion); *id.* at 27a (Dudley, J., concurring in part and dissenting in part). Moreover, the Arkansas plurality's entirely speculative characterization of the future electoral chances of heavily financed and well-known multi-term incumbents is far from the type of state-court finding of historical fact to which deference is due by this Court.

⁴ For all the reasons identified by petitioners (see U.S. Term Limits ("USTL") Br. 8-14, 25-50; State Br. 8-27, 36-48), we agree that such a construction would be incorrect.

Nor is there any historical support for the notion that the Framers expected or intended the Qualifications Clauses to bar state legislation that did not impose actual qualifications for membership in Congress. Indeed, respondents point to no evidence of any such understanding. They rely instead (Hill Br. 32; Thornton Br. 43-44) on general comments to the effect that "[u]nder these reasonable limitations [i.e., the Qualifications Clauses], the door [to Congress] . . . is open to merit of every description," and "[n]o qualification of wealth, of birth, of religious faith, or of civil profession, is permitted to fetter the judgment or disappoint the inclination of the people." *The Federalist* No. 52, at 355 (J. Cooke ed. 1961) (J. Madison); *id.* No. 57, at 385 (J. Madison).

Those statements say nothing whatsoever about a State's ability to adopt election laws like Amendment 73 that do not preclude the voters from choosing whomever they wish to represent them in Congress.⁵ At most, the cited statements can be read to suggest that, under the Constitution as written, all potential candidates would be eligible for congressional office as long as they satisfied the constitutionally prescribed minimum qualifications—a suggestion that does nothing to further respondents' case, because Amendment 73 leaves multi-term incumbents fully eligible for membership in Congress. Indeed, respondents' reading of these statements is impossible to reconcile with the Framers' explicit and repeated recognition that the States (subject only to

⁵ Thornton and the Solicitor General dispute this characterization of Amendment 73, asserting that the people of Arkansas "may be prevented from electing the person they wish to choose." Thornton Br. 50; see SG Br. 15. Plainly, however, nothing in Amendment 73 prevents the voters of Arkansas from reelecting multi-term incumbents if they "wish to" do so; rather, the Amendment merely counterbalances the many government-supplied political advantages enjoyed by multi-term incumbents and thereby ensures that they will be re-elected only if the voting public truly *does* prefer to be represented by them rather than their challengers.

congressional oversight) would have authority to regulate elections in ways that could have a profound impact on electoral outcomes. See Dickey Br. 14-18; *infra* pp. 9-11.

Respondents are equally unable to identify any judicial support for their novel reading of the Constitution. Indeed, in the more than 200 years of constitutional interpretation that preceded judicial consideration of Amendment 73 and similar provisions, *not one court* stated that a law leaving all candidates legally eligible for office could nonetheless violate the Qualifications Clauses. To the contrary, every court to discuss the question reached exactly the opposite conclusion.⁶

Moreover, as explained in our opening brief (Dickey Br. 11-12), this Court's decision in *Storer v. Brown*, 415 U.S. 724 (1974), compels rejection of respondents' strained reading of the Constitution. That case squarely held that a law excluding a certain class of candidates from the ballot did not violate the Qualifications Clauses because the affected candidates "would not have been disqualified" if they had been "elected at the general election." *Id.* at 746 n.16. Respondents offer no persuasive basis on which to distinguish *Storer* from this case.⁷

⁶ See, e.g., cases cited at Dickey Br. 19-20; see also *Stack v. Adams*, 315 F. Supp. 1295, 1298 (N.D. Fla. 1970); *State ex rel. Handley v. Superior Court*, 151 N.E.2d 508, 511 (Ind. 1958); accord *State ex rel. McCarthy v. Moore*, 92 N.W. 4, 5-6 (Minn. 1902) (reaching same result under analogous state constitutional provision).

⁷ Respondent Thornton does not even cite, let alone attempt to distinguish, *Storer* on this point. Respondent Hill suggests (Br. 30) that *Storer* is distinguishable because it involved "an election ground rule, with which any would-be candidate could have complied." But "qualifications" are not defined by whether some candidates will find it impossible to comply; candidate residency requirements are plainly qualifications, yet any would-be candidate can easily satisfy them. Moreover, it is simply not true that "any would-be candidate could have complied" with the ballot-access law at issue in *Storer*, which required a showing of both non-affiliation with a party and substantial popular support.

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Respondents' interpretation of the Qualifications Clauses is not only precluded by text, history, and case law, it is unacceptable for yet another reason: respondents have failed to identify any judicially manageable standards for distinguishing valid from invalid election laws under their reading of the Constitution. Apparently, respondents would strike down laws under which disadvantaged candidates will "almost always" lose or "almost never" win (Hill Br. 30; see Thornton Br. 39), but respondents offer no principled basis for applying that "test" to uphold the multitude of existing laws that have a similar effect on large classes of candidates (including ballot-access laws, redistricting measures,⁸ and

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Nor do laws "aimed at defeating certain persons because of a personal characteristic" (Hill Br. 30-31) necessarily constitute "qualifications." The law upheld in *Storer* fell squarely within that category; its explicit purpose and effect was to discourage a certain class of candidates from running in the general election because of their status as recent party members or unsuccessful primary candidates. 415 U.S. at 735.

Finally, *Storer* cannot be distinguished on the ground that the attribute of non-incumbency is "unrelated to [a candidate's] participation in the current election process." Hill Br. 31. A law rendering candidates ineligible for office if they commit election-law violations during their campaigns would plainly impose a qualification, yet that qualification would be directly "[r]elated to" candidates' "participation in the current process."

⁸ The Voting Rights Act, for example, has been construed to require States to redistrict in such a manner as to provide representation for particular racial or language-minority groups. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30 (1986). That focus on class-based results would apparently be unconstitutional under respondents' test, as would this Court's approval of redistricting measures aimed at preserving incumbents. See generally USTL Br. 23-25. With startling frankness, Thornton takes the position (Br. 47 n.47) that the State's power to regulate elections can be used only to preserve incumbency, not to render congressional elections more fair and open. Needless to say, nothing in the Constitution, this Court's decisions, or common sense

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the vast array of federal and state legislation providing political benefits to multi-term incumbents⁹), and indeed respondents' test would appear to invalidate many of those laws. See Dickey Br. 21-24.

II. AMENDMENT 73 IS A PERMISSIBLE EXERCISE OF STATE AUTHORITY TO REGULATE CONGRESSIONAL ELECTIONS

Respondents also contend (Hill Br. 32-40; Thornton Br. 44-49) that even if Amendment 73 does not violate the Qualifications Clauses it is nonetheless beyond the power of the State to enact under the Times, Places and Manner Clause.¹⁰ That contention is without merit.

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supports Thornton's self-interested assertion; numerous cases hold that States may take appropriate steps to ensure that elections are "fair" for all participants. See, e.g., cases cited Dickey Br. 33-34.

⁹ See, e.g., Dickey Br. 22-23; USTL Br. 21-25. Respondents do not explain whether their test for impermissible qualifications is satisfied by the 90-percent or higher rate of defeat for congressional challengers in recent elections, and indeed they do not even suggest how a court would go about making that determination. Presumably, however, if Amendment 73 is invalid under this amorphous test, the same fate would befall the combined advantages of multi-term incumbency. In this regard, it is worth noting that even in the most recent congressional elections, which saw an historic shift in control of both Houses of Congress, challengers had less than a one-in-ten chance of defeating incumbents (see USTL Reply Br. 4 n.5), and (according to Federal Election Commission data as of November 4, 1994) House incumbents outraised challengers by more than three-to-one (\$192 million to \$57 million).

¹⁰ Respondent Thornton also argues (Br. 45-46) that the Times, Places and Manner Clause is not "a font of state authority to change or add to the qualifications set forth in the Constitution." That argument is effectively rebutted in petitioners' opening briefs. More to the point, however, Thornton's argument simply has no relevance to the question whether the States can enact provisions like Amendment 73 that do not impose additional qualifications.

Respondents do not and cannot dispute that the Times, Places and Manner Clause authorizes the States (and Congress, see 2 U.S.C. § 9) to regulate the "[m]anner" of electing Members of Congress by requiring that elections shall be conducted by printed or machine ballot. See *Storer v. Brown*, 415 U.S. at 730; see generally *United States v. Classic*, 313 U.S. 299, 311 (1941); 2 *The Records of the Federal Convention of 1787* 240-41 (M. Farrand ed. 1911) ("Farrand"). It necessarily follows, therefore, that the States also have the power to prescribe mechanisms for determining which candidates will (and will not) be listed on the ballot. See, e.g., *Storer v. Brown*, 415 U.S. at 730. Because Amendment 73 does nothing more than regulate access to the ballot, it falls squarely within the scope of the States' power in this regard.

Respondents nonetheless assert that the Times, Places and Manner Clause contains an implicit limitation on its facially broad grant of authority to regulate the conduct of congressional elections. In their view, the Clause permits adoption only of "evenhanded" "procedural" laws that do not "skew outcomes" or "manipulate the electoral chances of a particular group or class of candidates." Hill Br. 33, 34; Thornton Br. 45, 47.

Once again, however, respondents' position finds absolutely no support in the language or history of the Clause or in judicial decisions construing its scope. Plainly, the Clause itself contains no textual limitation of the nature suggested by respondents; to the contrary, the Clause authorizes the States to adopt *any* regulations of the "[m]anner" of conducting elections without regard to the impact those regulations might have on the electoral chances of any particular individual or group. Indeed, far from providing a judicially enforceable check on state power along the lines suggested by respondents, the Clause specifies a different limitation

entirely: state election laws are subject to modification or override by Congress.¹¹

Nor is there any historical foundation for respondents' suggested reading of the Times, Places and Manner Clause. Indeed, despite respondents' cursory assertions to the contrary (see Thornton Br. 46; Hill Br. 34-35), the record is quite clear that, in the Framers' view, the Clause could, and doubtless would, be utilized to affect election outcomes in an almost unlimited variety of ways.

We have already set forth at length (Dickey Br. 16-18) the views expressed by Hamilton and Madison, both of whom plainly understood that the Times, Places and Manner Clause authorized legislation aimed at affecting or controlling election outcomes.¹² Accord 2 J. Story, *Commentaries on the Constitution of the United States* § 818, at 285 (1833) (recognizing the force of the argument that "the power [to regulate elect'ons] might, in a given case, be employed in such a manner, as to promote the election of some favourite candidate, or favourite class of men, in exclusion of others").

¹¹ Congress, of course, has chosen to take no action in response to Arkansas's adoption of Amendment 73.

¹² As demonstrated in our opening brief (Dickey Br. 17-18), respondent Hill's selective quotation of Hamilton's views (Hill Br. 34) is not to the contrary. While Hamilton may have believed that Congress could not impose additional *qualifications*, he never suggested that Article I implicitly limited federal power to adopt laws intended to skew election results, and in fact he assumed that Congress could adopt such laws. Similarly, respondent Thornton's characterization of Madison's views (Br. 46) is belied by the historical record. Far from asserting that "congressional manipulation of elections . . . was placed beyond Congress's authority" (*Id.*), Madison conceded that the powers contained in the Times, Places and Manner Clause "might materially affect the appointments" and would allow state legislatures (and, therefore, Congress as well) "so to mould their regulations as to favor the candidate they wished to succeed." 2 Farrand 240-41; see also 2 *The Debate on the Constitution* 693 (B. Bailyn ed. 1993) ("Bailyn").

The views of other political leaders of the era were in unanimous accord. For example, numerous commentators opposed the Times, Places and Manner Clause's grant of power to Congress precisely *because* that body would be able to influence or control the outcome of congressional elections.¹³ Supporters of the Constitution—including Convention delegates—did not dispute this description of Congress's power under the Clause. Instead, they defended that grant of power by arguing that Congress would never abuse its admitted authority to influence or dictate election results, and would exercise its power only when necessary to fill gaps in state law or to override state election laws that manipulated elections in an unfair manner.¹⁴

¹³ See 1 Bailyn 60 ("for as Congress have controul over both [the mode and places of the Representatives' election], they may govern the choice"), 100 ("Congress are to have the power of fixing the *time, place and manner* of holding elections, so as to keep them forever subjected to their influence"), 260-61 ("by a part of Art. I. Sect. 4. the general legislature may . . . evidently so regulate elections as to secure the choice of any particular description of men," and "all this may be done constitutionally"), 428 ("It is clear that, under this article, the federal legislature may institute such rules respecting elections as to lead to the choice of one description of men."), 896 ("I think it is a genuine power for Congress to perpetuate themselves"), 927 ("this is the article which is to make Congress omnipotent"); 2 Bailyn 855 ("It seems nearly to throw the whole power of election into the hands of Congress."), 859; 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 23 (J. Elliot ed. 1836) ("Elliot") ("by the 4th section [of Art. I], Congress would be enabled to control the elections of representatives").

¹⁴ See, e.g., 1 Bailyn 236, 293-94 ("does any man of common sense, really believe that the Congress will ever be guilty of so wanton an exercise of power? . . . [W]e may suppose that the State governments may abuse *their* power, and regulate these elections in such manner as would be highly inconvenient to the *people* And if such abuses should be attempted, will not the *people* rejoice that Congress have a constitutional power of correcting them?"); 2 Bailyn 693 (Madison), 857 (Congress's power under the Clause "might also be useful for this reason—lest a few powerful states should combine, and make regula-

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In sum, the Framers and their contemporaries clearly recognized that the ability to influence or even control outcomes was inherent in the States' power to regulate "[t]he Times, Places and Manner of holding Elections." They responded by placing the same power in Congress in order to provide a potential remedy for the unfair exercise of that authority by state legislatures. That remedy would have been wholly unnecessary if, as respondents contend, the Clause contained some sort of free-floating non-discrimination principle that precluded the States from adopting such laws in the first place.

Not surprisingly, this Court's cases provide no support for respondents' attempt to fashion a novel limitation on the Times, Places and Manner Clause. This Court has described the "comprehensive words" of the Clause as conveying "authority to provide a complete code for congressional elections," *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972), a grant of power so all-encompassing that it is "matched by state control over the election process for state offices." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). The Court has never suggested that this "broad power" (*id.*) or "wide discretion" (*United States v. Classic*, 313 U.S. at 311) is self-limiting in the manner suggested by respondents.

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tions concerning elections, which might deprive many of the electors of a fair exercise of their rights"), 860; 2 Elliot 26-27 (arguing that absent congressional authority to override state election laws "the power of influencing and controlling the election of the representatives of the people, will be exerted without control by the constituents of the senators [*i.e.*, the state legislatures]") (emphasis added), 48, 49, 50-51 (Rufus King), 441 (James Wilson) ("If those [state] legislatures possessed, uncontrolled, the power of prescribing the times, places, and manner, of electing members of the House of Representatives, the members of one branch of the general legislature would be the tenants at will of the electors of the other branch [*i.e.*, the state legislatures]; and the general government would lie prostrate at the mercy of the legislatures of the several states."); 3 Elliot 367.

To the contrary, *Storer v. Brown* compels rejection of respondents' misguided interpretation of the Times, Places and Manner Clause. If, as respondents contend, the Clause does not permit States to "manipulate the electoral chances of a particular group or class of candidates" (Thornton Br. 47) or "skew outcomes against persons with undesired characteristics" (Hill Br. 34), it surely would not have allowed the State of California to exclude from the ballot—and thereby "manipulate the electoral chances" of—all independent candidates possessing the "undesired characteristic" of having recently been affiliated with a political party.

Respondents' attempt to distinguish *Storer* on the ground that it involved an "even-handed" and non-discriminatory regulation of the electoral process (Hill Br. 35-36; Thornton Br. 48) is wholly unpersuasive. In the first place, as set forth in Part III below and in our opening brief (Dickey Br. 26-29), Amendment 73 is evenhanded and non-discriminatory within the meaning of *Storer* and similar cases. More to the point, however, respondents' purported distinction is wholly irrelevant to the question at issue, because nothing in the Times, Places and Manner Clause suggests that it imposes any such "evenhandedness" requirement.

As the sole support for their contrary position, respondents selectively quote passages from a number of this Court's First and Fourteenth Amendment decisions. See Hill Br. 33, 36-38; Thornton Br. 47-48. Each of the quoted passages, however, concerns only the constraints imposed by the First or Fourteenth Amendments, and cannot possibly be read to imply the existence in the Times, Places and Manner Clause of a heretofore unknown limitation on state power.

In short, respondents have failed to identify any basis for adopting their novel interpretation of the Clause. As a result, this Court should adhere to the plain language of the

Constitution and conclude that Amendment 73 falls well within the State's power to regulate congressional elections.¹⁵

III. AMENDMENT 73 IS ENTIRELY CONSISTENT WITH THE FIRST AND FOURTEENTH AMENDMENTS

Respondents' *amici* the California Democratic Party *et al.* ("CDP") and League of Women Voters *et al.* ("LWV") argue at length that this Court should invalidate Amendment 73 on the ground that it violates the First and Fourteenth Amendments. For the reasons set forth below, that argument is without merit.

A. This Court Should Not Address The Claim That Amendment 73 Violates The First Or Fourteenth Amendments

In the first place, this issue is not properly before the Court. The questions on which the Court granted certiorari in this case are limited to whether Article I of the Constitution invalidates Amendment 73 (*see* 93-1456 Pet. i; 93-1828 Pet. i), and it is well settled that *amici* are not entitled to inject additional questions beyond those set forth in the petitions. *E.g., United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981).

To be sure, a respondent may defend the judgment below on any ground that was pressed or passed upon below, but neither Thornton nor Hill presents any argument to the effect that Amendment 73 is invalid under the First and Fourteenth Amendments. Hill does make cursory reference to the arguments presented by *amicus* LWV on that issue (*see* Hill Br. 38 n.78), but this Court's Rules do not permit briefs to

¹⁵ Even if the Clause did not itself authorize legislation like Amendment 73, moreover, the people of Arkansas would nonetheless possess that authority by virtue of the Ninth and Tenth Amendments. *See* U.S. Const. amend. IX and X; *see also* USTL Br. 13-14.

incorporate by reference arguments and authorities set forth elsewhere. See Sup. Ct. R. 24.1(i), 24.2, 24.3.¹⁶

B. Amendment 73 Is A Valid Ballot-Access Measure That Does Not Unduly Infringe The Rights of Voters Or Candidates

In any event, the arguments presented by LWV and CDP are without merit. Amendment 73 is consistent with the First and Fourteenth Amendments because it is a reasonable, non-discriminatory ballot-access regulation that fosters the State's legitimate interests in enhancing the fairness, openness, and integrity of congressional elections. See Dickey Br. 24-36.

1. Amendment 73 Is Properly Subjected To Minimal Scrutiny Because It Imposes Only Minor, Non-discriminatory Burdens On The Rights Of Voters And Candidates

As demonstrated elsewhere (see Dickey Br. 26-33), Amendment 73 does not trigger heightened scrutiny under the First and Fourteenth Amendments because it does not discriminate against minor parties or independent candidates and imposes only minor burdens on the rights of candidates and voters. LWV and CDP offer no persuasive response to these points.

Instead, they repeatedly assert (LWV Br. 22-24; CDP Br. 20-27; cf. Thornton Br. 47-49) that Amendment 73 cannot be viewed as non-discriminatory within the meaning of

¹⁶ Moreover, respondents lack standing to raise any First or Fourteenth Amendment claim in this Court. Amendment 73 applies prospectively only (Pet. App. 25a), and thus at least one more election stands between respondents and any possible exposure to the effects of Amendment 73. As a result, respondents have suffered no present injury-in-fact sufficient to vest this Court with authority to rule on their entirely speculative claims. See, e.g., *ASARCO Inc. v. Kadish*, 490 U.S. 614, 612-13, 617-18 (1989); *Warth v. Seldin*, 422 U.S. 490, 493 (1975). Of course, respondents' lack of standing to raise additional issues does not undermine this Court's power to consider petitioners' challenge to the judgment below. See *ASARCO Inc.*, 490 U.S. at 617-19.

this Court's First and Fourteenth Amendment jurisprudence because it directly burdens the electoral chances of a discrete group of candidates. The same was true, however, of the law upheld by this Court in *Storer v. Brown*, which barred from the ballot those independent candidates who had recently been affiliated with a political party. The *Storer* Court nonetheless had no difficulty concluding that the challenged law was non-discriminatory (415 U.S. at 733), and the same conclusion is appropriate here. Accord *Clements v. Fashing*, 457 U.S. 957 (1982).

Equally baseless is the assertion (LWV Br. 25; CDP Br. 19) that Amendment 73 somehow amounts to "invidious" discrimination against multi-term incumbents and their supporters. The opinion for the Court in *Clements v. Fashing* expressly rejected the claim that discrimination against state officeholders constitutes "invidious" discrimination (457 U.S. at 972-73), and there is no basis for LWV's and CDP's implicit assertion that federal officeholders and their supporters are any more deserving of heightened constitutional protection. Accordingly, Amendment 73 should be subjected to minimal scrutiny.

2. Amendment 73 Serves Important And Legitimate State Interests That More Than Justify Its Minimal Burden On The Rights Of Voters And Candidates

As we have already explained (Dickey Br. 33-36), Amendment 73 directly fosters the legitimate and compelling state interests in enhancing the fairness, integrity, openness, and competitiveness of congressional elections. LWV and CDP offer two principal responses: first, that the State may not rely on those interests in defending Amendment 73 because the Amendment does not actually limit the terms of congressional incumbents; and second, that favoring challengers over multi-term incumbents is not a legitimate state interest. Neither response has merit.

First, LWV and CDP fundamentally err in asserting (LWV Br. 26-27; CDP Br. 9-11) that the justifications that led this

and other courts to uphold term limits on state officeholders do not apply in the context of Amendment 73. The people of the State of Arkansas have an equally strong interest in enhancing the fairness and openness of elections for *all* of their elected representatives, whether state or federal, and thus it is immaterial that Amendment 73 applies to federal officeholders.

Nor is Amendment 73 fatally flawed because it excludes multi-term incumbents from the ballot rather than disqualifying them from office. Term-limit laws are constitutional not because they impose qualifications for office, but rather because they advance legitimate governmental interests in expanding political opportunity and enhancing the fairness, openness, and competitiveness of the political process. *See, e.g.,* cases cited Dickey Br. 36-37 n.14. Precisely those same interests are advanced by Amendment 73, and thus it too is constitutional.

Second, LWV and CDP assert that it is illegitimate for the State to legislate for the purpose of favoring challengers over multi-term incumbents. *See* LWV Br. 26; CDP Br. 20-28. As *Storer*, *Clements*, and numerous other cases make clear, however, election laws will not be invalidated merely because they favor some candidates at the expense of others. The relevant question is not whether some candidates have been disadvantaged, but rather whether the interests served by the challenged law are legitimate and substantial.

Arkansas plainly has a legitimate and substantial interest in enhancing the fairness and competitiveness of congressional elections and opening the political process to new candidates and parties; CDP and LWV point to no authority to the contrary. Moreover, "[t]he State also has the right to prevent distortion of the electoral process" (*Anderson v. Celebrezze*, 460 U.S. 780, 789 n.9 (1983)), and Arkansas may appropriately exercise that right by ensuring that multi-term incumbents do not cling to their positions for decades merely as a result of the many political advantages con-

ferred upon them by federal law rather than "the public's support for [their] political ideas."¹⁷ *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 660 (1990).¹⁸

Rather than unfairly burdening those candidates who have "too much electoral support" (CDP Br. 25), Amendment 73 merely ensures that multi-term candidates who continue to win reelection do so *because* the majority of voters support them, not as a result of advantages conferred by federal law that are otherwise beyond the control of either the electorate or the State.¹⁹ There is nothing illegitimate about the interests advanced by Amendment 73, and it should therefore be upheld.

C. Amendment 73 Does Not Impose An Impermissible Burden On The Associational Rights Of Political Parties Or Their Members

CDP and LWV also contend (CDP Br. 12-18; LWV Br. 27-30) that this Court should invalidate Amendment 73 on the ground that it violates the associational rights of politi-

¹⁷ CDP contends (Br. 24-27) that there is little evidence to show that multi-term incumbents actually receive substantial political benefits by virtue of their offices. The statistics relating to incumbency retention, fundraising, and the like speak for themselves, however, and in the absence of compelling evidence to the contrary the people of Arkansas were plainly entitled to proceed on the common-sense assumption that multi-term incumbents win reelection in large part because of these government-conferred advantages. *See generally* State of Wash. *amicus* Br. A1-A15.

¹⁸ The fact that multi-term incumbents enjoy a wide array of government-conferred political advantages serves to distinguish Amendment 73 from state laws seeking to counterbalance other political advantages (such as wealth, family, and so forth) derived from other sources. Whatever the validity of state laws aimed at offsetting the latter attributes, there is no plausible basis for disputing the legitimacy of the State's approach here.

¹⁹ *See, e.g., Weber v. Heaney*, 995 F.2d 872 (8th Cir. 1993) (state funding of congressional candidates preempted by Federal Election Campaign Act); 2 U.S.C. § 453.

cal parties and their adherents by precluding parties from selecting multi-term incumbents as party nominees in congressional elections. That contention is without merit.²⁰

In the first place, this issue was not pressed or passed upon below. As a result, even respondents seeking to defend the judgment below would not be permitted to raise the issue here. See, e.g., *Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2466 (1993); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551-552 n.3 (1990). It follows a *fortiori* that the issue cannot be injected into the case by *amici*. *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. at 60 n.2.

Second, even if the Court were otherwise inclined to reach the issue raised by CDP and LWV, it would be unable to do so in this case. Contrary to CDP's and LWV's assumption, Amendment 73 does *not* bar multi-term incumbents from the ballot in primary elections. See State Reply Br. 7-8 n.4. Instead, it merely prevents such individuals from having their names "placed on the ballot for election to the United States [Senate or House of Representatives]." Amendment 73, § 3(a) and (b) (emphasis added). Accordingly, Amendment 73 does not impinge upon the ability of political parties to nominate whomever they choose,²¹ and

²⁰ Even if this argument had merit, moreover, it would not lead to affirmance of the judgment below. If Arkansas law violated the federal Constitution by rendering multi-term incumbents wholly ineligible for party nomination, the solution would not be to invalidate Amendment 73—which is a provision of the state constitution—but rather to strike down Ark. Code § 7-5-525(c), the statute that bars write-in voting in primary elections. See Amendment 73, § 6(b) (repealing all state laws "to the extent that they conflict with this amendment").

²¹ CDP nonetheless suggests (Br. 14 n.14) that multi-term incumbents can never win party nomination because Ark. Code § 7-1-101(4) would declare a "vacancy in nomination" if a multi-term incumbent were to win the primary, thereby triggering the party's obligation to select

(Footnote continued on following page)

the constitutional issue identified by CDP and LWV does not exist.

CONCLUSION

The judgment of the Supreme Court of Arkansas should be reversed.

Respectfully submitted.

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November 21, 1994

(Footnote continued from previous page)

someone else to fill that "vacancy." CDP misreads Arkansas law. A "vacancy in nomination" occurs only when a party's chosen nominee cannot be certified "due to death, resignation, withdrawal, or other good and legal cause arising subsequent to nomination." *Id.* (emphasis added). Amendment 73 is not a "cause arising subsequent to nomination," and thus it would not create a "vacancy in nomination."

NOV 22 1994

CLERK OF THE COURT

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

U.S. TERM LIMITS, INC., *et al.*,
Petitioners,

v.

RAY THORNTON, *et al.*,
Respondents.

STATE OF ARKANSAS *ex rel.* WINSTON BRYANT,
ATTORNEY GENERAL OF THE STATE OF ARKANSAS,
Petitioner,

v.

BOBBIE E. HILL, *et al.*,
Respondents.

**On Writ of Certiorari
to the Supreme Court of Arkansas**

**REPLY BRIEF FOR RESPONDENTS
REPUBLICAN PARTY OF ARKANSAS
AND W. ASA HUTCHINSON
SUPPORTING PETITIONERS**

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TABLE OF CONTENTS

	Page
STATEMENT	1
ARGUMENT	3
I. THE CONSTITUTION PERMITS STATES AND THE PEOPLE TO SET QUALIFICATIONS FOR MEMBERS OF CONGRESS	3
A. The Supposed Article I "Prohibitions" on Additional Qualifications.	4
B. The Tenth Amendment Reservation of Power "to the States, respectively."	5
C. The Tenth Amendment Reservation of Power to "the People."	8
II. THE HISTORICAL RECORD CONFIRMS THAT STATES AND THE PEOPLE MAY SET QUALIFICATIONS FOR MEMBERS OF CONGRESS	11
A. The Evolution of the Disqualification Clauses.	11
B. Drafting History of Unenacted Provisions.	14
C. Interpretations of the Constitution in Congress.	19
CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page
<i>Atascadero State Hosp. v. Scanlon</i> , 473 U.S. 234 (1985)	6
<i>Case of Brigham H. Roberts</i> , 1899, reprinted in 1 Asher C. Hinds, <i>Hinds' Precedents of the House of</i> <i>Representatives of the United States</i> § 474-480 (GPO 1907)	20
<i>Citizens for the Abatement of Aircraft</i> <i>Noise, Inc. v. Metropolitan</i> <i>Washington Airport Auth.</i> , 501 U.S. 252 (1991)	3
<i>Goldstein v. California</i> , 412 U.S. 546 (1973)	6
<i>Grove v. Emison</i> , 113 S.Ct. 1075 (1993)	10
<i>Karcher v. Daggett</i> , 462 U.S. 725 (1983)	10
<i>Leatherman v. Tarrant County Narcotics Unit</i> , 113 S. Ct. 1160 (1993)	8
<i>Lucas v. Forty-Fourth General Assembly</i> <i>of Colorado</i> , 377 U.S. 713 (1964)	10
<i>Nixon v. United States</i> , 113 S. Ct. 732 (1993)	4, 11
<i>Oregon v. Mitchell</i> , 400 U.S. 112 (1970)	16
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969)	4, 20

<i>U.S. Term Limits, Inc. v. Hill</i> , 872 S.W.2d 349 (Ark. 1994)	4
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Constitutions and Statutes

Art. I	<i>passim</i>
Art. I, § 2, cl. 1	9
Art. I, § 2, cl. 2	11, 13
Art. I, § 3, cl. 3	11
Art. I, § 4	3, 6
Art. I, § 6, cl. 1	8
Art. II, § 1	7
Art. II, § 3	7
Art. VI, cl. 3	4
Art. VII	9
Amendment X	<i>passim</i>
Amendment XVII	9
Kansas Const. of 1859 Art. III, § 13	19

Miscellaneous

<i>Congressional Districts in the 1990's</i> (1993)	10
52 Congressional Quarterly (Nov. 12, 1994)	2
2 The Debate on the Constitution (Bernard Bailyn ed., 1993)	5
2 The Debates in the Several States Convention on the Adoption of the Federal Constitution (Elliot ed. 1888)	7, 17

Jon Elster, <i>Intertemporal Choice and Political Thought</i> , in Lowenstein and Elster, eds, <i>Choice over Time</i> (Russell Sage Foundation, 1992)	1
2 Max Farrand, <i>The Records of the Federal Convention of 1787</i> (Yale 1937)	<i>passim</i>
Max Farrand, <i>The Framing of the Constitution</i> (Yale 1913)	13
<i>The Federalist</i> No. 32	6
<i>The Federalist</i> No. 52	18
<i>The Federalist</i> No. 60	17
1 Asher C. Hinds, <i>Hinds' Precedents of the House of Representatives of the United States</i> § 474-480 (1907)	20
9 <i>Writings of James Madison</i> (Hunt, ed.)	12
Cass R. Sunstein, <i>After the Rights Revolution</i> (Harvard 1990)	1
Charles Warren, <i>The Making of the Constitution</i> (1928)	<i>passim</i>

STATEMENT

Rather than accepting this case as a policy choice made by the People of Arkansas, respondents would portray it as a clash between the national government and a renegade state government bent on defying the national interest. The implication is that Arkansas voters are qualifying their own right to choose representatives for reasons unrelated to the formulation of sound national policy. But properly understood, the People of Arkansas are acting not defiantly but altruistically, allowing the public to recapture Congress from entrenched incumbents bent on serving narrow parochial interests.

Amendment 73 addresses a classic "collective action" problem by "pre-committing" the Arkansas electorate to a specific pattern of voting behavior.¹ Incumbents seem to benefit local interests because, as they gain power in Congress, they are better able to "deliver the goods" in the form of "pork" and other benefits to their local districts. But when Congress is organized on this principle, inefficiencies result and everyone suffers in the long run. Popular appreciation of this fact is strongly evidenced by the widespread dissatisfaction with Congress as a whole, but the seemingly contradictory citizen approval for their own members of Congress.² Amendment 73 allows Arkansans to join citizens of other States to solve the dilemmas of entrenched incumbency.

An amendment to the federal Constitution might appear to be the best solution for the collective action problems of incumbency. However, the easiest method of amending the Constitution—indeed, the only method that has ever succeeded—requires a supermajority in both Houses, each of

¹ See Cass R. Sunstein, *After the Rights Revolution*, 48-52 (Harvard 1990); Jon Elster, *Intertemporal Choice and Political Thought*, in Lowenstein and Elster, eds, *Choice over Time* (Russell Sage Foundation, 1992).

² While perhaps portrayed otherwise, the recent election results are consistent with this view. In the House, for example, not a single Republican incumbent lost. Republican gains came mostly from 22 captured Democratic open seats and 17 defeated freshman Democrats.

which is beholden to long-term incumbents. Amendment 73 and similar popular initiatives in other States³ solve this dilemma by signaling, far more decisively than any *ad hoc* action, Arkansans' willingness to contribute to the national collective good of a rotation of representatives. By so doing, Arkansas and States that follow its lead make the drastic step of a constitutional amendment less necessary. More importantly, by using State action in the national interest to correct undemocratic impulses in Washington, they have employed precisely the check that the Framers had in mind.

Respondents and their amici suggest that Amendment 73 was framed as a ballot-access measure to skirt putative constitutional limits on "state power to add qualifications." Hill Br. at 27; *accord* Thornton Br. at 39; United States Br. at 23. Fairly understood, however, Amendment 73 has more to do with democratic principles than constitutional law. As written, it merely creates a rebuttable presumption against the re-election of long-serving incumbents. With no experience to judge from, it is pure speculation to question whether mobilized electorates will be able to overcome Amendment 73's presumption and re-elect incumbents rather than new candidates. See, e.g., Thornton Br. at 41-42.

The People of Arkansas demurred from imposing an absolute bar on incumbent service because they expected that some incumbents, even if deprived a place on the ballot, might still command a majority of the electorate. If a less popular candidate were seated only because an incumbent write-in candidate was disqualified from service, the seated candidate's legitimacy as a servant of the People would inevitably be compromised. By stopping short of an absolute bar, therefore, Arkansans have encouraged turnover without ultimately binding themselves to electing their second choice.

³ In the recent election, seven States passed Congressional term-limits proposals by referendum. Now 22 States have Congressional term-limits provisions in effect. See 52 Congressional Quarterly 3251 (Nov. 12, 1994).

ARGUMENT

Amendment 73 survives constitutional scrutiny whether considered as a ballot-access provision or a qualification. The Constitutional text, structure, history, and later interpretation in Congress all demonstrate the Framers' intention to reserve to the States and the People the authority to set reasonable qualifications for their representatives in Congress. Moreover, as demonstrated by our fellow parties, Amendment 73 may also be sustained under Art. I § 4 as a ballot-access regulation.

This case cannot turn on whether Amendment 73 is called a qualification or a ballot-access measure. On this score, the debate is reminiscent of one not long ago in which the Court dismissed arguments over whether Congress had delegated "legislative" rather than "executive" powers to a "Board of Review" on the ground that the label applied did not matter. See *Citizens for the Abatement of Aircraft Noise, Inc. v. Metropolitan Washington Airport Auth.*, 501 U.S. 252 (1991). The same is true here. No matter how much respondents want to focus on the labeling issue, Amendment 73 is constitutional regardless of how it is categorized.

I. THE CONSTITUTION PERMITS STATES AND THE PEOPLE TO SET QUALIFICATIONS FOR MEMBERS OF CONGRESS

The Tenth Amendment provides that "[p]owers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people." Amend. X (emphasis added). Respondents here do not claim that power to set qualifications has been delegated to the United States; indeed, they hotly deny it. See United States Br. at 7-10; Thornton Br. at 31-32. They are forced, then, either to identify specific Constitutional prohibitions on the States' and the People's authority to limit Congressional terms, or else to concede that Amendment 73 passes muster. As shown below, respondents have failed to identify any such prohibition. Accordingly, Amendment 73 is

within the retained authority both of Arkansas and of its People.

A. The Supposed Article I "Prohibitions" on Additional Qualifications. The Arkansas Supreme Court held that Amendment 73's "restriction on eligibility to stand for election to the U.S. Congress is violative of the respective Qualification clauses of Article 1 of the U.S. Constitution." *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 355 (Ark. 1994). But respondents do not directly defend that position since they cannot claim that Amendment 73 "violates" the express terms of the Disqualification Clauses or any other specific provision of the Constitution.

What the Arkansas court termed the "Qualification Clauses" are actually *Disqualification Clauses*, having been deliberately drafted as such in Philadelphia. See Opening Br. at 4; pp. 11-14 *infra*. These Clauses, framed in the negative, can only be read to set forth minimum, not exclusive, qualifications. Respondents' sole reply is to argue that dictum in *Powell v. McCormack*, 395 U.S. 486 (1969), compels this Court to interpret not the ratified Constitution but its penultimate draft, as submitted to the Convention's Committee of Style. Hill Br. at 14-15. But that claim was definitively answered by *Nixon v. United States*, 113 S. Ct. 732 (1993), where the Court observed that "we must presume that the Committee[] [of Style's] reorganization or rephrasing accurately captured what the Framers meant in their unadorned language." *Nixon* thus rejected once and for all respondents' claim that "the *second to last draft* [should] govern in every instance where the Committee of Style added an arguably substantive word." *Id.* at 737. (emphasis added)

The equally clear text of Article VI, Clause 3 confirms that the Disqualification Clauses mean what they say:

The *Senators and Representatives* before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and

of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Art. VI cl. 3 (emphasis added). This express prohibition on religious tests for, *inter alia*, "Senators and Representatives," would have been unnecessary had Article I's disqualifications been exhaustive. See Opening Br. at 8-9.

Respondent Hill replies with the half-hearted suggestion that, in drafting the religious-test ban, the Framers meant to imply "except Congress." See Hill Br. at 23 n.51. But as explained in our opening brief, the religious-test prohibition was intentionally drafted to exclude those State officers covered by the Oath or Affirmation requirement immediately preceding it. Had the Framers wanted to further narrow the religious-test provision as respondent Hill suggests, the natural way to do so would have been to repeat the appropriate phrase from earlier in the clause, and thus to apply the ban only to "executive and judicial officers [] of the United States." Remarkably, respondent Thornton's answer is even less persuasive, resting, as it does, on combination of non-sequitur, Thornton Br. at 19 n.18 (citing 2 *The Debate on the Constitution* at 556 (Bernard Bailyn ed., 1993)) and an entirely non-substantive citation, see *id.* (citing 2 Max Farrand, *The Records of the Federal Convention of 1787* at 342, 468 n.24 (Yale 1937) ("*Farrand*").

B. The Tenth Amendment Reservation of Power "to the States, respectively." Effectively conceding, that the Disqualification Clauses do not actually "prohibit" Amendment 73, respondent Thornton next argues that the Tenth Amendment is overridden by what he calls the "comprehensive regulation" of federal legislators in Article I. Thornton Br. at 4. According to Thornton, this regulation essentially occupies the field except in those "few instances" where the Framers "made an explicit and circumscribed

delegation of the subject to the States.” *Id.* at 15. But this imaginative argument cannot compensate for the absence of a prohibition in Constitutional text itself.

First, respondent Thornton’s argument reverses the canon of construction expressly provided in the Tenth Amendment. The Constitution’s structure and history are predicated on the theory, later codified in the Tenth Amendment, that States retain all authority except that expressly surrendered to the United States. As this Court has recognized, “[t]he Constitution never would have been ratified if States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself.” *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239 n.2 (1985).

Second, respondent effectively asks the Court to take the unprecedented step of applying statutory “field preemption” doctrines to a constitutional claim. *Cf. Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). But the constitutional preemption test, adapted from *The Federalist* No. 32, permits a finding of implied preemption only “where [the Constitution] granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.” *Goldstein v. California*, 412 U.S. 546, 553 (1973) (citing *The Federalist* No. 32) (emphasis in original). Thus, *Goldstein*’s “totally contradictory and redundant” test, not the statutory field-preemption doctrine governs. Any other result would eviscerate the Tenth Amendment.

Third, the Art. I, § 4 Elections Clause is not a delegation of power to the States, as Thornton’s argument assumes, but a mandate imposed on States. The Elections Clause, inspired by the bitter experience of the Framers at the Convention, is aimed at guaranteeing the participation of State representatives in Congress. As George Read explained to a fellow delegate a full week *after* the Convention was due to open:

We have no particular accounts from New Hampshire Maryland, you may probably have heard more certain accounts of than we who are here. Rhode Island hath made no appointment [of delegates] yet. The gentlemen who came here early, particularly Virginia . . . express much uneasiness at the backwardness of individuals in giving attendance.

Charles Warren, *The Making of the Constitution* 115 (1928) (“Warren”). Eventually, all delegations except Rhode Island did attend the convention, but several missed critical parts of the proceedings.

Fearing that a lack of participation might be a recurring problem in national councils, the Framers’ solution was, first, to compel States to hold Congressional elections and, second, to permit Congress itself to hold such elections if a State refused to do so. *Cf. 2 The Debates in the Several States Convention on the Adoption of the Federal Constitution*, 24 (Elliot ed. 1888) (“Elliott”) (explanation of the need for the clause); *id.* at 552 (rejected proposal to limit its use to such situations). The Elections Clause thus provides that Congress *may* prescribe time, place, and manner rules, but that States *shall* do so. The relation between this clause and States’ reserved powers is analogous to that between the clause vesting “executive power” in the President, *see* Art. II, § 1, and the one requiring the President to “take Care that the Laws be faithfully executed.” *See* Art. II, § 3. In each case, the clause imposing a duty presumes power provided elsewhere. In the case of the Election Clause, that power comes from the inherent, reserved authority of the States to hold elections for the People’s representatives in Congress.

Fourth, The Solicitor General suggests that neither Congress nor the States can regulate Congressional terms, apparently on the theory that Congressmen enjoy a sort of *extra-textual* constitutional immunity from such regulation. *See* United States Br. at 7-16. But when the framers wanted to

create a Congressional immunity, they knew how to do so. Indeed, Article I includes a specific list of Congressional immunities, but that list does not include the supposed immunity from State electoral regulation. *See* Art I, § 6, cl. 1 (privileges against arrest; Speech or Debate Clause). In light of the Tenth Amendment's canon of construction, the absence of any express immunity from term limits proves that no such immunity exists. *See Leatherman v. Tarrant County Narcotics Unit*, 113 S. Ct. 1160 (1993).

C. The Tenth Amendment Reservation of Power to "the People." None of respondents' many errors is more fundamental than their insistence on treating this case as if it involves State power *alone*. After all, it was the People of Arkansas, not the State legislature, who enacted Amendment 73. To be sure, the People bound the State to assert its own authority on their behalf, but that fact does not rob the original voter-initiative of its singularly democratic character. Accordingly, two sources of reserved power under the Tenth Amendment, not one, are at issue here.

The distinction between a State's authority and that of its People was critical to the Founding. The Articles of Confederation established the first national government exclusively on the basis of State authority. *See* Articles of Confederation Preamble (stating that "the undersigned Delegates of the States . . . agree to certain articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, [etc.]"). Article II of the Articles of Confederation did not mention the people but instead said that "Each *State* retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States." (emphasis added).

The Framers of the Constitution consciously rejected this legacy and erected a new Constitution in the name of the People. Accordingly, the Constitution begins, "*We the People*

of the United States," and ends by requiring its own ratification through popular convention, not State legislation. *See* Art. VII. The Tenth Amendment makes this conception even more explicit, reserving power not vested in the federal government, to the States *and* the People. Thus, the Constitution assigns power to the People over and above any reservation of authority to the States.

Significantly, Art. I § 2, cl. 1 assigns to "the People of the several States" the right to "choose" representatives, and the Seventeenth Amendment assigns to the People "of each State" the right to "elect" Senators. *See* Art. I, § 2, cl. 1; Amend. XVII. Under Amendment 73, the People of Arkansas exercised this right of choice, by establishing rules that presume non-incumbents will be "chosen" ("elected") at least in every fourth House and third Senate election. Equally important, Amendment 73's presumptions were approved by a majority of voters—the very method by which the electorate selects Representatives and Senators. The issue, then, is not who may choose representatives. It is whether the People's expressly assigned powers under Article I, the Seventeenth Amendment, and the Tenth Amendment, include the power to establish presumptive rules of decision, or whether the People must instead exercise complete discretion at every election.

Respondents reject the People's right to pre-commit themselves to rotation, insisting that the Constitution *mandates ad hoc* decisionmaking. Yet there is nothing in the Constitutional text that even suggests, much less requires, this result. Article I, for example, says only that Representatives must be "chosen every second year by the People of the several States"; it does not say that they must be chosen by *ad hoc* decisionmaking. Precommitments, voluntarily made, are as valid a means of choosing as case-by-case decisionmaking. Indeed, in light of the collective action problem described above, precommitment may well be the only means of reaching an outcome that is in the national interest. Despite respondents' pretended solicitude for popular sovereignty, it is

Amendment 73's opponents, not its supporters, who advocate restricting the authority of the People.

Nor was precommitment of the kind reflected in Amendment 73 unanticipated at the Founding. The Convention itself required that Congressional elections occur within the boundaries of particular States, rejecting proposals to hold them across State lines. *See Warren* at 115-16. This rule creates constituencies of greatly disparate size which, were they not constitutionally mandated, would be constitutionally prohibited.⁴ The reason for the Framers' seeming abrogation of democratic principle in this instance is apparent—requiring that elections be conducted within State boundaries gives the People the option of regulating by State law their own choice of a delegation to the Congress. That power is, of course, constrained by the substantive guarantees in the First and Fourteenth Amendments.⁵ But, subject to these constraints, it lies entirely in the People's hands.

⁴ *See Karcher v. Daggett*, 462 U.S. 725 (1983) (invalidating New Jersey's Congressional districts on account of population variances of less than one percent). For example, Montana's single House Member represents over 820,000 people, whereas Wyoming's Member represents fewer than 500,000. Two Senators represent more than 30 million Californians, whereas another two Senators represent Wyoming's relatively small population. *See Congressional Districts in the 1990's* (1993).

⁵ The Solicitor General implies that Amendment 73 constitutes an infringement of the rights of a minority by voters in the majority, citing *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 736-37 (1964). *United States Br.* at 16. Unlike *Lucas*, however, where a redistricting scheme burdened a particular class of voters in Colorado's Denver metropolitan area, no such class has been identified here. Additionally, the Solicitor General implies that the rights of voters of individual Congressional districts might have been infringed by the statewide electorate. *Id.* at 15-16. Because Congressional districts are creatures of State law, however, no such infringement is possible. *See Grove v. Emison*, 113 S.Ct. 1075, 1081 (1993).

II. THE HISTORICAL RECORD CONFIRMS THAT STATES AND THE PEOPLE MAY SET QUALIFICATIONS FOR MEMBERS OF CONGRESS.

In interpreting the Constitution, "the plain language of the enacted text is the best indicator of intent." *Nixon*, 113 S. Ct. at 737. But should the Court nonetheless decide to tour the historical record, it will find that it only reinforces the plain meaning of the Constitutional text. As demonstrated below, the history of (1) the Disqualification Clauses, (2) several unenacted Constitutional provisions, and (3) Congress' application of Article I, all confirm that the Framers expected States and the People to set reasonable qualifications for Congressional office.

A. **The Evolution of the Disqualification Clauses.** The Disqualification Clauses, like virtually every other provision of the Constitution, were framed by the Convention's two drafting Committees—the Committee of Detail and the Committee of Style. As the drafting progressed, the clauses that became Art. I, § 2, cl. 2, and § 3, cl. 3 evolved from a form setting unambiguously exclusive qualifications, to an intermediate and unclear form, and finally to the current non-exclusive form. This history, which demonstrates that Article I's Disqualification Clauses were not intended to be exclusive, is summarized below.

On May 25, 1787, the Convention officially convened (almost two weeks late) when a quorum of State delegates finally arrived in Philadelphia. *Warren* at 120. After dispensing with preliminary matters, the Convention soon resolved itself into a Committee of the Whole, which deliberated continually until June 19. The work of the Committee of the Whole was occupied entirely with considering, point by point, various resolutions presented by Edmund Randolph (the so-called "Virginia Plan"). As Madison later explained:

The Resolutions proposed by him [Randolph] were the result of a consultation among the [Virginia] deputies, the whole number, seven, being present. The part which Virginia ha[d] borne in bringing about the Convention suggested the idea that some such initiative step might be expected from their deputation; and Mr. Randolph was designated for that task. . . . Mr. R. was made the organ on the occasion, being then the Governor of the State, of distinguished talents, and in the habit of public speaking.

Warren at 141 (quoting *9 Writing of James Madison* 502 (Hunt ed.)). After nearly a month's work, the Committee on the Whole reported out nineteen resolutions on June 20.

The Convention thereafter sat continually (except for the national holiday on July 3 and 4), considering these "Randolph Resolutions" until July 26. It then recessed for eleven days (its only recess other than the holiday) to allow a Committee of Detail to draft and report a Constitution conforming to the Randolph Resolutions, as amended by the Convention. Randolph himself was a member of the Committee of Detail, as were James Wilson and its Chairman, John Rutledge.

On August 6, the Committee reported to the Convention a draft Constitution. *2 Farrand at 177-89*. The Convention proceeded to consider and revise this draft, provision by provision, until mid-September. By September 8, most of the work had been completed, and a Committee of Style (which included Madison, Hamilton, and Rufus King) was appointed to rewrite and rearrange the Committee of Detail's draft, as amended. Five days later, the Committee of Style reported a rephrased and rearranged version of the Constitution. After last-minute changes, the Constitution was signed on September 17, 1787.

The first known version of the Disqualification Clauses appeared in a draft Constitution written in Randolph's hand for the Committee of Detail. Historians agree that this manuscript "undoubtedly represents the first and basic draft of the Constitution." *See Warren at 386; Max Farrand, The Framing of the Constitution of the United States* 125 (Yale 1913). In Randolph's draft, the predecessor of Art. I's Disqualification Clause provided that "delegates shall be the age of twenty five years at least, and citizenship *and any person possessing these qualifications may be elected except.*" *2 Farrand* 139 (emphasis added). On the original manuscript, however, the words italicized above were crossed out. Elsewhere on the draft were written various notes authored by Randolph or the Committee Chairman, John Rutledge. *See Warren at 386; Farrand, The Framing of the Constitution* 125 (Yale 1913). The implication historians have drawn from this evidence is that Randolph, the floor manager for the Virginia Plan, presented a first draft Constitution to the Committee, which then considered and revised it under the direction of Chairman Rutledge. *Id.* From the italicized language above, it seems beyond dispute that the Committee of Detail intentionally rejected language that unequivocally would have set exclusive qualifications for members of Congress.

As ultimately reported by the Committee of Detail, an intermediate version of what became the Disqualification Clauses was phrased positively but ambiguously:

Every member of the House of Representatives shall be of the age of twenty five years at least; shall have been a citizen of the United States for at least three years before his election, and shall be, at the time of his election, a resident of the State in which he shall be chosen.

2 Farrand at 178. This language was later reshaped by the Committee of Style, however, into the familiar, unambiguous, non-exclusive form it assumes today: "No person shall be a Representative . . ." Art. I, § 2, cl. 2. The Framers thus

consciously amended successive versions of the Disqualification Clauses until they took their present, non-exclusive form.⁶

Confronted with this evidence, respondents insist on mischaracterizing the Randolph draft as "Randolph's notes," see e.g., Thornton Br. at 13 n.8, 22-23, and greatly downplaying the role of the Committee of Detail. *Id.* at 22-23. In fact, what respondents call "Randolph's notes" were "undoubtedly . . . the first and basic draft of the Constitution." *Warren* at 386. Moreover, at the time the draft was composed, the Committee of Detail was the Convention, the remainder of the delegates having been allowed to recess while it completed its labors. Like every other word of the Constitution, the Disqualification Clauses were painstakingly framed by the Founders. They mean exactly what they say.

B. Drafting History of Unenacted Provisions.

With the most relevant history against them, respondents place their emphasis on less relevant material—especially, debates

⁶ Interestingly, although the language reported by the Committee of Detail was phrased ambiguously and in positive terms, there is evidence that the Committee had also considered a somewhat clearer, negative version. In addition to the Randolph draft, two later Committee of Detail drafts of the Constitution in James Wilson's hand (again with emendations by Rutledge) also exist. The earlier of these, after correction, reads almost precisely as did the Committee's final product:

Every member of the House of Representatives shall be of the Age of twenty five Years at least; shall have been a citizen in the United States for at least three Years before his Election, and shall be, at the Time of his Election, a Resident of the State in which he shall be chosen.

² *Farrand* at 153. This first Wilson draft includes, however, the marked out words "No person shall be capable of being chosen." *Id.* Thus, the Committee of Detail considered the very clarification ultimately made by the Committee of Style. Why the first Committee should prefer ambiguous phrasing to both the unambiguously exclusive language of Randolph's draft and the unambiguously non-exclusive language of the Wilson's is not known.

during the Convention and ratification over provisions that do *not* appear in the Constitution. First, respondents claim that if the Constitution were understood to *permit* term limits, its anti-federalist opponents would not have made such a fuss about its failure to *require* them. Thornton Br. at 16. Also, they insist that the Convention's failure to delegate power to Congress to set qualifications means that it must have intended to withdraw such power from the States. These arguments fail for the following reasons:

First, respondents erroneously presume that a higher legislative body in the constitutional scheme (such as the Convention or Congress) preempts legislation by a lesser body (such as a State legislature) simply by declining to enact legislation. Any such argument is logically flawed even apart from the Tenth Amendment's reservation of authority to the States and the People.

Second, respondents claim that anti-federalists would not have opposed the Constitution vigorously for its failure to *require* term-limits, if they had believed that States were free to enact them on their own. This claim is belied by the Articles of Confederation. Under the Articles, States undoubtedly *were* permitted to impose term limits on their delegates to Congress. See Articles of Confederation, Article V ("delegates [to Congress] shall be annually appointed in such manner as the legislature of each State shall direct"). But the Articles also *imposed* national term limits directly. See *id.* ("no person shall be capable of being a delegate for more than three years in any term of six years").

Respondents assume the anti-federalists would have readily accepted the lack of national terms limits if State term limits were permitted by the Constitution. But as recent history shows, where term limits are not absolutely mandated, States have the incentive to return incumbents so as to gain more than their share of federal benefits. Given this collective action problem, unless States jointly agree to term limits, or act altruistically, the practical ability of States to limit terms

unilaterally is considerably diminished. The anti-federalists waged war over this issue, not because the Constitution foreclosed States from imposing term limits, but because it, unlike the Articles, did not require them.

Third, the Framers' fears about delegating power to elected representatives to set what amounts to their *own* qualifications applies with far less force when such qualifications are to be set by another body (such as a State legislature) or the People themselves. *See, e.g., 2 Farrand* at 250 (Williamson: "Should a majority of the Legislature be composed of any particular description of men, of lawyers for example, which is no improbable supposition, the future elections might be secured to their own body").

Fourth, respondents take rhetorical advantage of confusing usage employed by the Framers. In nearly all debate at the Convention, "Legislature" denotes what we mean today by "Congress." At the Convention, the term "Congress," as used in the modern sense, was first introduced in Article III of the Committee of Detail's draft Constitution. *See 2 Farrand* at 177. But this usage never became common, first, because the Committee of Detail draft itself used "Legislature" almost everywhere else (*see, e.g., Art. III; Art. VI; Art. VII; Art. VIII; Art. X; Art. XI; Art. XIII; Art. XVII*); and second because at the time "Congress" was commonly used to refer to the Confederation Congress then assembled in New York. Although opinions from this Court have recognized that "Legislature" often means "Congress," *see Oregon v. Mitchell*, 400 U.S. 112, 290 (1970), respondents overlook this fact.

Considered in this context, respondents' arguments are easily refuted. Their favorite passage, for example, is one from debates over allowing Congress to set property qualifications, in which Madison said he was "opposed to vesting an improper and dangerous power in the Legislature" because "[t]he qualification of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution." *2 Farrand* at 249-50. In invoking this passage,

respondents commit errors one, three and four described above. To summarize: The Convention could not possibly preempt State action by *declining* to delegate power to Congress. Madison's desire to fix qualifications in "the Constitution" is answered by fixing them in a *State* Constitution, beyond the reach of legislators. And Madison's reference to the "Legislature" obviously refers to Congress, not to all federal and state legislative bodies. Respondents' other favorite sound bites include statements by Hamilton, *see Hill Br.* at 15; United States Br. at 13 (committing errors one and four in invoking *The Federalist* No. 60); Gilbert Livingston, *see Thornton Br.* at 24 n.24; United States Br. at 14 (error two in invoking a speech at the New York ratifying convention); and Melancthon Smith, *see Thornton Br.* at 27; United States Br. at 14 (same).

Respondents also place great store in what supposedly was *not* said at the Founding. Thus, they claim that "[n]o proponent of ratification attempted to blunt . . . criticism [of the Constitution] by arguing that states could set term limits or other added qualifications." *Hill Br.* at 17. But, in addressing disqualifications during the Massachusetts ratifying convention, Rufus King:

observed that no such [property] qualification is required by the Confederation. In reply to Gen. Thompson's question, why disqualification of age was not added, the honorable gentleman said, that it would not extend to all parts of the continent alike. Life, says he, in a great measure, depends on climate. What in the Southern States would be accounted long life, would be but the meridian in the Northern; what here is the time of ripened judgment is old age there. Therefore the want of such a disqualification cannot be made an objection to the Constitution.

2 Elliot at 36.

This passage makes apparent that the shared assumptions of King and his audience were (1) that national property qualifications were left in Philadelphia as they had

been under the Confederation (with State authority unquestioned); and (2) that Article I includes a list only of those qualifications that are, in Madison's phrase, "susceptible of uniformity," not of all qualifications that States might want to impose. Nor can King's assumptions be lightly dismissed: King was, along with Madison, Wilson, and Gouverneur Morris, one of the leading federalists at the Convention. See Warren at 160. Moreover, like Madison and Hamilton, he was also a member of the Committee on Style. *Id.* at 686.

Fittingly, however, it is Madison himself who delivers the knockout blow to respondents' historical argument. In *The Federalist* No. 52, Madison states that "[t]he definition of the right of suffrage is very justly regarded as a fundamental right of republican government." *The Federalist* No. 52 at 326 (Madison) (Clinton Rossiter ed., 1961). This passage recalls his speech during the Convention debate over Congressional power to set qualifications, where he stated specifically that "[t]he qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution." 2 *Farrand* at 249-50. But in the very next paragraph of the *Federalist*, Madison continues:

The qualifications of the elected being less carefully and properly defined by State constitutions, and being at the same time more susceptible of uniformity, have been very properly *considered and regulated* by the Constitution.

The Federalist No. 52 at 326 (emphasis added). The contrast between these closely parallel passages could not be more striking—or more important. When discussing Congressional power, Madison says qualifications are properly *fixed* by the Constitution. But when discussing State qualifications, he says they have been *considered and regulated*, but not fixed. Read together, Madison's statements strongly reconfirm the plain

meaning of the Disqualification Clauses and the Tenth Amendment.⁷

C. **Interpretations of the Constitution in Congress.** With the Constitutional text and history all adverse, respondents look for shelter in Congress's application of the Disqualification Clauses. They gamely attempt to revive the *McCreery* election case as a basis for arguing that Congress has considered state-imposed qualifications impermissible, *see, e.g.,* Thornton Br. at 33-34; but to no avail, *see* Opening Br. at 7-8. Respondents also claim that the seating of Illinois Congressman Samuel Marshall and Illinois Senator Lyman Trumbull in 1856 supports their contention that States may not add qualifications. *See* Hill Br. at 22. Tellingly, however, a mere three years later, Congress expressly approved a Kansas constitution containing the very provision that respondents claim the earlier Congress had deemed unconstitutional. *See* Kansas Const. of 1859, Art. III, § 13 (in *The Federal and State Constitutions* at 1249 (Thorpe ed., 1907)).

Fortunately, there is more recent and definitive Congressional authority on this issue—authority that establishes unambiguously Congress's view that States could,

⁷ Space has limited our response to many of the "historical" arguments made by respondent Thornton. Suffice it to say, however, that he stretches history mightily in many places. This can be seen, *inter alia*, in his treatment of Committee of Detail's proposal to delegate authority to set "uniform" property qualifications to Congress. In the space of just three pages, Thornton: (1) joins in a single sentence two statements made by John Rutledge in separate speeches advocating two different proposals, *see* Thornton Br. at 17; (2) asserts that Oliver Ellsworth "proposed to delegate property qualifications for federal legislators to the States," *id.*, when in fact Ellsworth said nothing about State authority, but addressed only whether Congress should be constrained to setting "uniform" qualifications; (3) claims that "no delegate seconded" supposed proposals by Rutledge and Ellsworth, *id.*, when neither Rutledge nor Ellsworth made a motion calling for a second; and (4) supports the proposition that the religious-test ban was intended "to ensure that the Constitution's 'oath' requirement did not itself create a religious test" solely with citations to *Farrand* that simply restate the text of the provision, *id.* at 19 n. 18.

indeed, impose additional qualifications for Congressional office. In 1899, the House debated whether Brigham Roberts, a known polygamist from Utah, could take a seat in the House. See Case of Brigham H. Roberts, 1899, reprinted in 1 Asher C. Hinds, *Hinds' Precedents of the House of Representatives of the United States* § 474-480 at 518-560 (1907). A House committee majority found that Roberts was not disqualified under any provision of the Constitution, but would not recommend seating him. The committee's report expressly rejected the notion that the disqualifications in the Constitution are exclusive, saying: "the language of the constitutional provision [Art. I, sec. 2, cl. 1], the history of its framing in the Constitutional Convention, and its context clearly show that it can not be construed to prevent disqualification for crime," 1 Hinds § 476 at 521-22.

On this Committee's recommendation, an overwhelming majority of the House voted to disqualify Roberts. It is telling that the minority disagreed only on the grounds that the federal law used to disqualify Roberts did not constitutionally apply beyond the territories and that Utah itself had not disqualified Roberts—not that there could be no disqualifications other than those in the Constitution. *Id.* at 554-57. In short, although the power of Congress to impose the qualification was contested, both the majority and minority agreed that States may impose such qualifications.

CONCLUSION

Having failed to find a prohibition on State-imposed qualifications in the Constitutional text or history, respondents are left with the stray dicta from this Court's decision in *Powell*. But *Powell* held only that one House of Congress may not impose *ad hoc* qualifications. It did not reach the question presented—whether the States and the People may impose qualifications beyond those found in the Disqualification Clauses. In light of the Tenth Amendment and the above discussion, this question must be answered in the affirmative. The decision below should be reversed and remanded.

Respectfully submitted,

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AUG 15 1994

OFFICE OF THE CLERK

No. 93-1456

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

U.S. TERM LIMITS, INC. *et al.*,
Petitioners,

v.

THORNTON, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of Arkansas

BRIEF OF GOVERNOR JOHN ENGLER
AS AMICUS CURIAE IN SUPPORT OF
PETITIONERS

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39 PP

(i)

QUESTION PRESENTED

Does Arkansas Amendment 73 regulating the placement of the names of long-term incumbents on the ballot violate Article I of the United States Constitution?

(ii)

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. Article I, Section 4 of the United States Constitution Allows States Broad Regulatory Power Over Elections	4
A. The Constitutional Convention	5
B. The State Ratifying Conventions	6
C. The Federalist and Anti-Federalist Papers	12
II. Age, Citizenship and Inhabitancy are Only Minimal Requirements	17
A. The Constitutional Convention	19
B. The State Ratifying Conventions	23
C. The Federalist and Anti-Federalist Papers	23
CONCLUSION	25
APPENDIX	1A

(iii)

TABLE OF AUTHORITIES

	<u>Pages</u>
CONSTITUTIONAL PROVISIONS:	
U.S. Const., art. I, § 2	<i>passim</i>
U.S. Const., art. I, § 3	<i>passim</i>
U.S. Const., art. I, § 4	<i>passim</i>
CASES:	
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819)	9
STATUTES:	
Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 67	17
Act of Apr. 30, 1790, ch. 4, 1 Stat. 112	17
Act of Apr. 10, 1806, ch. 20, 2 Stat. 359, 362	17, 18
Act of Apr. 10, 1806, ch. 20, 2 Stat. 359, 362	17, 18
Act of June 25, 1842, ch. 47, 5 Stat. 491	4
Act of June 15, 1844, ch. 68, 5 Stat. 670	4
Act of Feb. 26, 1853, 10 Stat. 170, 171	18
Act of Feb. 26, 1853, ch. 81, 10 Stat. 170, 171 ..	18
Act of Aug. 30, 1856, ch. 30, 11 Stat. 150	4
Act of July 16, 1862, ch. 180, 12 Stat. 577, 578 ..	18
Act of June 11, 1864, ch. 119, 13 Stat. 123	18
Act of Feb. 25, 1865, ch. 52, 13 Stat. 437	18
Act of July 25, 1866, ch. 245, 14 Stat. 243	4
Act of Mar. 2, 1867, ch. 153, 14 Stat. 428, 429 ..	18

(iv)

	<u>Pages</u>
Voting Rights Act of 1870, ch. 114, 16 Stat. 140, 141	18
Act of Mar. 22, 1882, ch. 47, 22 Stat. 30, 31-32 ..	18
Criminal Code of 1909, ch. 321, 35 Stat. 1088-1112	18
Act of Sept. 16, 1942, ch. 561, 56 Stat. 753, 754-55	4
Act of Apr. 1, 1944, ch. 150, 58 Stat. 136	4
Criminal Code of 1948, ch. 645, 62 Stat. 683, 691-97	18
Criminal Code of 1948, ch. 645, 62 Stat. 683, 719-20	18
Criminal Code of 1948, ch. 645, 62 Stat. 683, 790	18
Criminal Code of 1948, ch. 645, 62 Stat. 683, 795	18
Criminal Code of 1948, ch. 645, 62 Stat. 683, 807-08	18
Internal Security Act of 1950, ch. 1024, 64 Stat. 987, 991-92	18
2 U.S.C. § 1 et seq. (1994)	4
18 U.S.C. § 203(b) (1994)	18
2 U.S.C. § 431 et seq. (1994)	4
18 U.S.C. § 591 et seq. (1994)	4
18 U.S.C. § 592 (1994)	18
42 U.S.C. § 1973 et seq. (1994)	4
42 U.S.C. § 1973gg-3 (1994)	4
18 U.S.C. § 591 et seq. (1994)	4
Ark. Code Ann. § 7-1-102 et seq. (West 1993) ...	4

(v)

	<u>Pages</u>
Cal. Elections Code § 1 et seq. (West 1994)	5
OTHER AUTHORITIES:	
<i>Elliot's Debates on the Federal Constitution</i> (2d ed. 1901)	<i>passim</i>
<i>Guide to the Congress of the United States</i> (Congressional Quarterly Service, 1971)	17
Roderick M. Hills, Jr., <i>A Defense of State Constitutional Limits on Federal Congressional Terms</i> , 53 U. Pitt. L. Rev. 97 (1991)	10,20, 23,24
James Madison, <i>Notes of Debates in the Federal Convention</i> (2d ed. 1985)	<i>passim</i>
Stephen Safranek, <i>Term Limitations: Do the Winds of Change Blow Unconstitutional?</i> 26 Creighton L. Rev. 321 (1993)	3
Stephen Safranek, <i>The Constitutional Case for Term Limits</i> (U.S. Term Limits Foundation, 1993)	3
Joseph Story, <i>Commentaries on the Constitution</i> (4th ed. 1973)	16
<i>The Complete Antifederalist</i> (1981)	41
<i>The Federalist</i> (Clinton Rossiter ed., 1964)	<i>passim</i>
<i>The Records of the Federal Convention</i> (Max Farrand, ed., 1937)	17

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BRIEF OF GOVERNOR JOHN ENGLER
AS AMICUS CURIAE IN SUPPORT OF
PETITIONERS

Governor John Engler submits this brief as amicus curiae in support of the petitioners.

INTEREST OF THE AMICUS

Governor John Engler is the chief executive officer of the State of Michigan. The people of the State of Michigan enacted a term limit law in 1992. This law provides that long-term incumbents may no longer serve after a certain number of years. As a consequence, if Arkansas Amendment 73 is found to be unconstitutional, the Michigan law will be affected.

Besides being the governor of a state that overwhelmingly approved term limits, John Engler is a citizen of the United States and of the State of Michigan. As such, he

wants to ensure that the playing field between long-term incumbents and political newcomers is leveled. The citizens of Michigan have decided how such a leveling could be achieved, as have the citizens of numerous other states. Governor Engler thus joins with petitioners in asking this Court to uphold the overwhelming decision of citizens who have been given the choice to vote on limiting the power of long-term incumbents.

STATEMENT OF THE CASE

The citizens of the State of Arkansas adopted Amendment 73 to the Arkansas Constitution by a vote of 494,326 to 330,836 on November 3, 1992. This citizen-initiated amendment provides in pertinent part that, "any person having been elected to three (3) or more terms as a member of the United States House of Representatives from Arkansas shall not be eligible to appear on the ballot for election to the United States House of Representatives from Arkansas." A similar ballot access measure of two (2) terms exists for United States Senators.

A lawsuit for declaratory relief was filed on November 13, 1992, in Pulaski County Circuit Court. The circuit court found that Amendment 73 was not a time, place and manner regulation under Article I, Section 4 of the United States Constitution. Consequently, the circuit court found that Amendment 73 violated Article I, Sections 2 and 3 of the United States Constitution, which set forth age, citizenship, and inhabitancy requirements for members of Congress. The Arkansas Supreme Court upheld this decision. A petition for certiorari was granted by this Court on June 20, 1994.

SUMMARY OF ARGUMENT

This brief will show that Amendment 73 to the Arkansas Constitution is constitutional by first considering Article I, Section 4 of the United States Constitution, which allows states to regulate the "Times, Places and Manner of holding Elections." This brief will also show

that Amendment 73 is consistent with the minimum requirements of age, citizenship, and inhabitancy placed on federal senators and representatives by the Constitution. This brief will focus almost exclusively on the historical record at the time of the adoption of the Constitution.¹

The unvarying historical record and practice show that the states and Congress have broad power to regulate elections under Article I, Section 4 of the United States Constitution. The breadth of the power retained by the states and granted to Congress by Section 4 has been thought to allow states to prevent the holding of elections and to allow Congress to disqualify persons from office who have engaged in various acts. Numerous other examples show not only that the states and Congress have the power to broadly regulate elections but also that Article I, Sections 2 and 3, which set forth the age, citizenship, and inhabitancy requirements for members of Congress have been considered minimal qualifications. This understanding of the powers retained by the states and given to Congress under Article I, Section 4 is consistent with the explicit text of the Constitution, the views of the members of the Constitutional Convention, the views of the members of the state ratifying conventions, the reasoning expressed by the Federalists and Anti-Federalists during the ratification process, and the unvarying practice of the states and Congress. In short, no justification in the text of the Constitution or in historic practice exists to support the view that Amendment 73 of the Arkansas Constitution violates Article I of the United States Constitution.

¹ A more extensive review of most of this material can be found in the book and article counsel has written on this matter. See Stephen Safranek, *Term Limitations: Do the Winds of Change Blow Unconstitutional?*, 26 Creighton L. Rev. 321 (1993); Stephen Safranek, *The Constitutional Case for Term Limits* (U.S. Term Limits Foundation, 1993).

ARGUMENT

I. ARTICLE I, SECTION 4 OF THE UNITED STATES CONSTITUTION ALLOWS STATES BROAD REGULATORY POWER OVER ELECTIONS

Article I, Section 4 of the United States Constitution provides that:

[T]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.²

Congress has broadly exercised the power allocated to it under this part of the Constitution.³ States have also extensively regulated elections. The State of Arkansas, whose law is under review by this Court, has extensive ballot regulations,⁴ including provisions preventing some

² U.S. Const., art. I, § 4.

³ Congress has enacted an abundance of regulations pursuant to this power. See generally Act of June 25, 1842, ch. 47, 5 Stat. 491; Act of June 15, 1844, ch. 68, 5 Stat. 670. Through such statutes Congress has regulated the time for holding elections for Congress. See Act of Aug. 30, 1856, ch. 30, 11 Stat. 150; Act of July 25, 1866, ch. 245, 14 Stat. 243. It has even regulated the specific format for the request for absentee ballots and the ballot itself. Act of Sept. 16, 1942, ch. 561, 56 Stat. 753, 754-55; Act of Apr. 1, 1944, ch. 150, 58 Stat. 136. Today there are no less than one hundred and ninety statutes or code provisions in the United States Code governing elections, ballots or political activity. See generally 2 U.S.C. §1 et seq. (1994); 2 U.S.C. §431 et seq. (1994); 18 U.S.C. §591 et seq. (1994); 42 U.S.C. §1973 et seq. (1994). One example of such regulation is the recent "motor voter" statute requiring states to provide for simultaneous application for voter registration and application for motor vehicle licenses. 42 U.S.C. §1973gg-3 (1994).

⁴ See generally Ark. Code Ann. § 7-1-102 et seq. (West 1993).

groups from having names of their candidates placed on the ballot.⁵ California has devoted over 35,000 sections to regulating its elections.⁶ The exercise of these powers by the states and Congress is consistent with the language of Article I, Section 4 and its historical understanding found in the reports from the Constitutional Convention, the state ratifying conventions and the Federalist and Anti-Federalist debates.

A. The Constitutional Convention

Article I, Section 4 was first presented in the Constitutional Convention by the Committee of Detail on August 6, 1787. The section first read:

The Times and Places and Manner of holding Elections for the members of each House shall be prescribed by the Legislature of each State; but their provisions concerning them may, at any time, be altered by the Legislature of the United States.⁷

Although this section was entirely new, it met with little discussion in the Convention. Only the "manner" clause that gave the federal legislature ultimate control over elections was the subject of debate. James Madison argued that the federal legislature must have ultimate power because states might use their power under this clause to mold their regulations to favor the candidates they wished to succeed.⁸ Gouverneur Morris supported Madison by noting that without this provision for federal

⁵ *Id.* at § 7-3-108.

⁶ See generally Cal. Elections Code § 1 et. seq. (West 1994).

⁷ James Madison, *Notes of Debates in the Federal Convention*, 387 (2d ed. 1985).

⁸ *Id.* at 424.

control, states might make false returns and prevent new elections.⁹

The wording of this article was slightly revised by the Committee of Detail on September 12, 1787, and a provision for not allowing the federal legislature to move the place of the choosing of senators was added without debate.¹⁰ The state conventions did not show the same restraint in debating Article I, Section 4.

B. The State Ratifying Conventions

Many of the representatives at the state ratifying conventions were disturbed by the broad language of Article I, Section 4 because it gave Congress the power to alter state decisions regarding elections.¹¹ Members of practically all of the state conventions were disturbed by the word "manner" in Article I, Section 4 because they thought that it had virtually unlimited meaning. Second, the members of these conventions thought that the broad meaning of this word, placed as it is in the time clause, gave Congress unfettered discretion to alter elections. No other entity, legislative, executive or judicial, state or federal, could control this discretion.

The term "manner" in Article I, Section 4 of the proposed Constitution caused a sharp controversy in virtually all of the recorded debates of the state conventions. For instance, Representative Cooley, in Massachusetts, said that under this clause Congress had "authority to control

⁹ *Id.*

¹⁰ *Id.* at 635.

¹¹ See 4 *Elliot's Debates on the Federal Constitution* 50 (2d ed. 1901) (Hereinafter *Elliot's Debates*). Governor Johnston of North Carolina was led to exclaim concerning this clause, "I observe that every state which has adopted the Constitution, and recommended amendments, has given directions to remove this objection [regarding the broad power given to Congress]; and I hope, if this state adopts it she will do the same." *Id.* His comment was not untypical.

elections, and thereby endanger liberty."¹² He was followed by Representative Taylor who said that the manner clause allowed Congress to place money qualifications upon electors.¹³ Thus, the initial discussion of this term at the Massachusetts convention reveals a twofold concern: the extent of the power given and the vesting of that power in Congress.

The response of those who sought ratification of the Constitution reveals that Representative Taylor understood the meaning of manner but that he miscalculated the potential for abuse of the power given by Article I, Section 4. Rufus King, a member of the Massachusetts delegation to the Constitutional Convention, defended the ambiguity in Article I, Section 4. He noted that the Constitution largely left the regulation of elections to the states because states had differing ways of electing representatives.¹⁴ However, King noted that in some states the manner of elections prevented representation proportional to the number of persons eligible to vote in various districts.¹⁵ In South Carolina, for instance, Charleston sent 30 out of 200 representatives to the state legislature even though it did not have 15% of the population of the state. Because of the city's hold on power, it did not allow a change in representation. Such a problem, King noted, can and should be rectified by Congress so that the representatives would truly "be chosen by the people."¹⁶ King's response, which argues for the amplitude of Article I, Section 4, effectively ended the discussion.

The Massachusetts convention spent about 15% of its

¹² 2 *Elliot's Debates* 49.

¹³ *Id.* at 49-50.

¹⁴ *Id.* at 50.

¹⁵ *Id.*

¹⁶ *Id.* at 51.

recorded time discussing the term "manner." The degree of concern about this clause also can be seen in the recommendations by Massachusetts for amendments to the Constitution. Among their nine recommendations was:

Thirdly, that Congress do not exercise the powers vested in them by the 4th Section of the 1st article, but in cases where a state shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation in Congress, agreeable to the Constitution.¹⁷

New York, the most critical northern state, considered the Constitution nearly six months after Massachusetts and after five additional states had been added to the ratification list, which then numbered ten. The concerns articulated in that debate are similar to those seen in the Massachusetts convention. The debate was initiated by Representative M. Jones who proposed an amendment to the Constitution similar to that proposed in Massachusetts.¹⁸

Representative Jay apparently tempered the desire for such an amendment when he noted, "The obvious meaning of the [manner] paragraph was, that, [if the states neglected to elect representatives] . . . Congress should have power, by laws, to support the government, and pre-

¹⁷ *Id.* at 177.

¹⁸ "Resolved, as the opinion of this committee, that nothing in the Constitution, now under consideration, shall be construed to authorize the Congress to make or alter any regulations, in any state, respecting the times, places, or manner of holding elections for senators or representatives, unless the legislature of such state shall neglect or refuse to make laws or regulations for the purpose, or, from any circumstance, be incapable of making the same, and then only until the legislature of such state shall make provisions in the premises."

2 *Elliot's Debates* 325-26.

vent the dissolution of the Union."¹⁹ In the discussion that followed, the delegates said that Article I, Section 4 provided state and federal legislatures with the power to determine who could vote, where they could vote, and how to establish voting districts.²⁰ Jay's views, as well as those of his critics, show that both Federalists and Anti-Federalists thought the power given by Article I, Section 4 was broad. Indeed, Jay argued for adopting the Constitution while acknowledging the amplitude of Article I, Section 4. This view was similarly held in the great southern state of Virginia.

Two of the central figures in early American history debated Article I, Section 4 before the Virginia convention. James Madison spoke in favor of the Constitution before the Virginia convention. Patrick Henry opposed him. Their views about Article I, Section 4 recapitulate and highlight those views presented in the northern conventions. Patrick Henry said,

[B]ut how will they obviate the danger of referring the manner of election to Congress? Those illumined genii may see that this may not endanger the rights of the people; but in my unenlightened understanding, it appears plain and clear that it will impair the popular weight in the government. Look at the Roman history. They had two ways of voting – the one by tribes, and the other by centuries. By the former, numbers

¹⁹ *Id.* at 326. Since the existence of the United States is not threatened by the Arkansas amendment, the use of such power by the courts would "apply that theory of interpretation [to the Constitution] which was then rejected by the friends of the new constitution, and . . . engraft upon it powers . . . extent, which were disclaimed by . . . [advocates of the Constitution], and which, if they had been fairly avowed at the time, would have prevented . . . [the Constitution's] adoption." Argument of Mr. Martin, Attorney General of Maryland in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 373 (1819).

²⁰ 2 *Elliot's Debates* 326-29.

prevailed; in the latter, riches preponderated. According to the mode prescribed, Congress may tell you that they have a right to make the vote of one gentleman go as far as the votes of a hundred poor men. The power over the manner admits of the most dangerous latitude.²¹

Here, Patrick Henry illuminates the key problem with Article I, Section 4: the word "manner" is open to an interpretation so broad that it would allow the states or Congress to change the value of the citizens' votes.²²

James Madison responded to Patrick Henry's comments by reiterating what he had said at the Constitutional Convention: ultimate power over elections had to be given to Congress to "prevent its own dissolution."²³ Similar arguments were made at other conventions. For instance, Representative James Iredell, later a justice of the United States Supreme Court, stated in the North Carolina convention that the federal legislature needed this power in case a state was involved in war and its legislature could not assemble to send representatives,²⁴ or a few states might deprive their electors of the right to vote,²⁵ or a few states might combine to prevent an election of representatives at all, thus preventing formation of a quorum in Congress.²⁶ Madison attempted to assuage the fears of the

²¹ 3 *Elliot's Debates* 175.

²² See also Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. 97, 103-04 (1991).

²³ 2 *Elliot's Debates* 366.

²⁴ 4 *Elliot's Debates* 53.

²⁵ *Id.* at 54.

²⁶ *Id.*

Anti-Federalists by further noting that "in most instances though, if [elections] be regulated properly by the state legislatures, the congressional control will very probably never be exercised. The power appears to me satisfactory, and as unlikely to be abused as any part of the Constitution."²⁷ Madison thus re-emphasized that even though the term "manner" is broad, Congress was not likely to use the power given to it by such language to abuse the states. Madison, just like the proponents of the Constitution in the other debates, never disputed that manner has a meaning so broad that it could allow Congress to make the votes of one person equal to those of a hundred, or to entirely prevent elections. Instead, he merely argued that as long as a state did not abuse its power so as to threaten the Union, Congress would be unlikely to act.

This debate between Patrick Henry and James Madison captures the sense of the various state debates and the meaning of Article I, Section 4 as seen by the members of the various conventions. "Manner" was seen as an expansive term. Indeed, those opposing its inclusion in the Constitution thought that it allowed those with authority – ultimately Congress – unlimited discretion to control elections. Similarly, those championing ratification stated that although the term "manner" provides expansive powers, Congress is likely to exercise its power under this clause only when it must do so to preserve itself as an institution. Thus, the arguments of both Federalists and Anti-Federalists support Arkansas's Amendment 73. Furthermore, these discussions indicate that Congress has the power to modify or reform the Arkansas amendment if it thinks that the amendment strikes at the heart of representative government.

Finally, despite Madison's strong championing of the Constitution as then proposed, Virginia's convention also sought to limit congressional power with an amendment

3 *Elliot's Debates* 367. See also comments by Nicholas, *Id.* at 10.

similar to those proposed in the northern states.²⁸ This amendment, along with similar ones proposed by other conventions, shows that the states feared the power of Article I, Section 4 and wanted to constrain the federal legislature's ability to abuse it. Thus, the discussions at the state conventions, as well as amendments proposed at them, reveal that the powers retained by the states under Article I, Section 4 are far more extensive than those exercised by the citizens of Arkansas in adopting Amendment 73.²⁹

C. The Federalist and Anti-Federalist Papers

The Federalist and Anti-Federalist dispute was not confined to the state conventions. Newspaper accounts and pamphlets were written by those who advocated adoption of the proposed Constitution – the Federalists – and by those who opposed adoption – the Anti-Federalists. The views of both Federalists and Anti-Federalists support the constitutionality of Amendment 73 of the Arkansas Constitution.

The New York newspapers carried one of the great debates regarding adoption of the Constitution. The articles, written under the pseudonym Publius, urged New York to ratify the Constitution and were used as models for debates elsewhere.³⁰ One of the chief writers of these articles was Alexander Hamilton. His careful evaluation reinforces the broad interpretation of Article I, Section 4

²⁸ "That Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse, or be disabled, by invasion or rebellion, to prescribe the same." 3 *Elliot's Debates* 661. Pennsylvania proposed a similar amendment. 2 *Elliot's Debates* 441.

²⁹ Other states have no information to add to the discussion because they have left few recorded debates.

³⁰ *The Federalist* at ix-xi (Clinton Rossiter ed., 1964).

previously discussed and supports the constitutionality of Amendment 73. He stated in Federalist No. 59: "I am greatly mistaken, notwithstanding, if there be any article in the whole plan more completely defensible than this. Its propriety rests upon the evidence of this plain proposition, that every government ought to contain in itself the means of its own preservation."³¹ He further noted that the proposed Constitution would establish a system in which, in the ordinary course of events, the states would regulate elections.³² Hamilton argued that Congress was given the ultimate power over providing for the election of senators and representatives in order to prevent the dissolution of the federal government by the states.³³ If the federal government was not given this power, some members of some states, through their ability to regulate elections, could "discontinue the choice of members for the Federal House of Representatives."³⁴ Hamilton's analysis of Article I, Section 4 concurs with that of every other contemporaneous source in positing that states have extremely broad power over elections. Their power is virtually unlimited except insofar as Congress can correct their actions or insofar as their actions conflict with another constitutional provision. Hamilton further noted that the Constitution submits "the regulation of elections

³¹ *Id.* at 362.

³² *Id.* at 362-63.

³³ *Id.* at 364-65.

³⁴ *Id.* at 366.

for the federal government, in the first instance, to the local administrations; which, in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory."³⁵ Hamilton thus argued that states have the primary power to regulate their elections and that only an impropriety that threatens Congress's essential functions can be corrected by Congress. Under Hamilton's reading of the Constitution, the courts should not arbitrate disputes over the regulation of elections.³⁶ In his view, such disputes ought to be fought out between the states and Congress. If Congress believes that a state has overreached itself, Congress clearly has the power to correct that action.

The reason for giving Congress this power arose in the context of a weak central government and strong state power. Providing Congress with the ultimate power to control elections was done, according to Hamilton, because "to do otherwise would leave the existence of the Union entirely at [the states'] mercy."³⁷ The states might annihilate the federal government by various measures without this safeguard.³⁸

Hamilton recognized that the states' power under the Constitution was such that if the state legislatures acted in unison pursuant to Article I, Section 4 they could reduce the Senate's power by not choosing senators. He did not say that state legislatures lack such power, but that the use of such power could be mitigated by Congress pursuant to its power under Article I, Section 4. Hamilton also noted that the Constitution dealt with such potential problems by staggering elections, thereby giving any such state actions minimal effect by leaving the Senate with a

³⁵ *Id.* at 362-63.

³⁶ Unless, of course, some other part of the Constitution is violated.

³⁷ *Id.* at 363.

³⁸ *Id.*

quorum after each election.³⁹

In addition, the direct election of representatives was seen as a counterbalance to any attempt by a few persons in a state legislature to control the election of federal representatives.⁴⁰ This counterbalance again shows the dedication of the Founders to a balance of powers within the federal government and between the states and the federal government. Because of their concern over state manipulation of federal representatives, the representatives to the Constitutional Convention granted Congress the power to correct any regulations it deemed wrongly enacted or even unconstitutional. In so doing, it saw that Congress's self-interest was sufficient to correct state abuses and that the courts need not step in to resolve most disputes.

The Anti-Federalist attacks on Article I, Section 4 predictably paralleled the arguments made against it in the various state conventions. Just as predictable was the fact that the Anti-Federalists agreed that the powers granted under Article I, Section 4 gave the legislature broad authority. The words of pseudonymous Agrippa were typical:

Can any man, in the free exercise of his reason, suppose that he is perfectly represented in the legislature, when the legislature may at pleasure alter the time, manner and place of elections. By altering the time they may continue a representative during his whole life; by altering the manner they may fill up the vacancies by their votes without the consent of the people; and by altering the place all the elections may be made at the seat of the federal government.⁴¹

³⁹ *Id.* at 363-65.

⁴⁰ *Id.* at 365-66.

⁴¹ Letter from Agrippa to the Massachusetts Convention (Jan. 22, 1788), in 4 *The Complete Antifederalist*, 102 (1981). See also Centinel's

The people feared that "manner" was an expansive term that allowed the legislature broad power to change elections. They particularly feared that this power could be exercised by Congress to appoint whomever they wished to congressional offices.

Thus, every historical source of information confirms that both the states and Congress were thought to have powers under Article I, Section 4 that far exceed those exercised by Arkansas under Amendment 73.⁴²

letter to the Freemen of Pennsylvania at 142; *Aristocratis of Pa.*, v. 3 at 201; *Vox Populi* v. 4 at 42; *Cincinnatus* v. 6 at 31.

⁴² Joseph Story also thought that these powers were extensive. He wrote:

The most that can be urged, with any show of argument, is, that the power might, in a given case, be employed in such a manner as to promote the election of some favorite candidate or favorite class of men.

Joseph Story, *Commentaries on the Constitution*, §820 at 578 (4th ed. 1973).

II. AGE, CITIZENSHIP AND INHABITANCY ARE ONLY MINIMAL REQUIREMENTS

Article I, Section 2 of the United States Constitution, as well as Section 3, set forth minimum requirements for the respective offices. Section 2 states:

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

Although Arkansas Amendment 73 does not prohibit someone from serving in Congress if elected, the Arkansas Supreme Court has treated Amendment 73 as a disqualification. Furthermore, it has held that age, citizenship, and inhabitancy are exclusive qualifications. Contrary to the view of the Arkansas Supreme Court, all the historical evidence reveals that the federal and state conventions, as well as the states and Congress, have uninterruptedly thought that age, citizenship, and inhabitancy were minimum requirements. In fact, the First Congress, in which James Madison served, enacted two statutes disqualifying some persons from holding an office under the United States.⁴³ Such disqualifications have been enacted at least thirty-eight other times in eleven separate Congresses.⁴⁴

⁴³ Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 67 (treasury officials acting with conflicts of interest); Act of Apr. 30, 1790, ch. 4, 1 Stat. 112 (persons who bribe a federal judge or being bribed as a federal judge). Of the 39 signers of the Constitution, 17 served in the First Congress. Besides Madison, Rufus King and Robert Morris also served in the First Congress. See generally *Guide to the Congress of the United States*, 1a-175a (Congressional Quarterly Service, 1971); 4 *The Records of the Federal Convention*, 587-90 (Max Farrand, ed., 1937).

⁴⁴ Act of Apr. 10, 1806, ch. 20, 2 Stat. 359, 362 (army officer who makes, signs, or directs a false muster); Act of Apr. 10, 1806, ch. 20,

Moreover, at least eleven such disqualifications are part of the current *United States Code*.⁴⁵ This unbroken history and current practice are also supported by the pre-enactment history.

2 Stat. 359, 362 (army officer who accepts money on mustering any regiment or troops); Act of Feb. 26, 1853, 10 Stat. 170, 171 (fraud on treasury of the United States); Act of Feb. 26, 1853, ch. 81, 10 Stat. 170, 171 (bribery or undue influencing of members of Congress); Act of July 16, 1862, ch. 180, 12 Stat. 577, 578 (members of Congress or officer of United States who takes consideration for procuring contracts or those who offer money to such persons); Act of June 11, 1864, ch. 119, 13 Stat. 123 (members of Congress or heads of departments who receive pay for services in any matter where the United States is a party); Act of Feb. 25, 1865, ch. 52, 13 Stat. 437 (interference with elections by military); Act of Mar. 2, 1867, ch. 153, 14 Stat. 428, 429 (disqualified persons of rebel states); Voting Rights Act of 1870, ch. 114, 16 Stat. 140, 141 (conspiring to deprive someone of civil rights); Act of Mar. 22, 1882, ch. 47, 22 Stat. 30, 31-32 (bigamists and polygamists prevented from holding office); Criminal Code of 1909, ch. 321, 35 Stat. 1088-1112 (twelve different disqualifications including treason, rebellion, civil rights violations, bribe taking and bribe giving); Criminal Code of 1948, ch. 645, 62 Stat. 683, 691-97 (acceptance or solicitation of bribes and procurement of contracts); Criminal Code of 1948, ch. 645, 62 Stat. 683, 719-20 (troops at the polls); Criminal Code of 1948, ch. 645, 62 Stat. 683, 790 (trading in public property); Criminal Code of 1948, ch. 645, 62 Stat. 683, 795 (concealment, removal or mutilation of records); Criminal Code of 1948, ch. 645, 62 Stat. 683, 807-08 (treason, rebellion, or insurrection); Internal Security Act of 1950, ch. 1024, 64 Stat. 987, 991-92 (communication of classified information).

⁴⁵ 18 U.S.C. § 203(b) (1994) (compensation to members of Congress, officers and others for matters affecting government); 18 U.S.C. § 592 (1994) (sending troops to the polls); 18 U.S.C. § 592 (1994) (interference by armed forces in elections); 18 U.S.C. § 1901 (1994) (trading in public property); 18 U.S.C. § 2071(b) (1994) (concealment or mutilation of documents); 18 U.S.C. § 2381 (1994) (treason); 18 U.S.C. § 2383 (1994) (rebellion or insurrection); 18 U.S.C. § 2385 (1994) (advocating overthrow of government); 18 U.S.C. § 2387 (1994) (advocating mutiny or insubordination in military); 46 U.S.C. § 59 (1994) (neglect of proper registering and recording of vessels by officers); 46 U.S.C. § 322 (1994) (malfeasance pertaining to regulation of vessels).

A. The Constitutional Convention

The discussion of age, citizenship, and inhabitancy at the Constitutional Convention, the wording of Article I, Sections 2 and 3, and the structure of the Constitution all suggest that the requirements of age, citizenship, and inhabitancy for senators and representatives were meant to ensure that states sent minimally qualified candidates to the federal Congress. Madison's notes taken at the Constitutional Convention do not provide any support for the proposition that age, citizenship, and inhabitancy are the exclusive qualifications for members of Congress imposed by the Constitution.⁴⁶

Property and money qualifications were vigorously debated when various plans were discussed at the Constitutional Convention. Such qualifications were rejected by the Convention because property or money qualifications might keep persons of ability out of government.⁴⁷ The Convention finally agreed that the list of disqualifications should be shorter rather than longer, thereby "leaving to the wisdom of the Legislature and the virtues of the Citizens, the task of providing against evils [of bad legislators]."⁴⁸ The wisdom of the legislature or citizens might lead them to prevent other categories of persons from holding office. This agreement to establish minimal qualifications is understandable because the Constitutional Convention was called to limit state power. The Convention was trying to protect the federal government by developing requirements that all federal officers must have to serve in federal office. The Convention did not prevent the states from setting higher standards.

⁴⁶ James Madison, *Notes of Debates in the Federal Convention* (2d ed. 1985).

⁴⁷ *Id.* at 373. Gouverneur Morris noted that some proposed indebtedness qualifications might have enabled an over-zealous auditor to keep General Washington from being President.

⁴⁸ *Id.* at 377-78 (Comments of Elsworth).

As a consequence, only an age qualification for federal representatives was agreed to by the Convention until the Committee of Detail proposed on August 6, 1787, that residency and citizenship be added.⁴⁹ These additional requirements were the subject of considerable debate.⁵⁰ None of these discussions, however, indicated that the requirements established by the Constitution prohibit the states from imposing additional qualifications. The very reason for the requirements was to protect the federal legislature from foreign or immature counsel. This protection is not weakened by states adding requirements. To assume that the stated requirements were exclusive is to misunderstand the reasons for establishing them. The federal government wanted to prevent states from sending people too little qualified for federal office, not to prevent states from adding to these requirements as each state saw fit. Although adding requirements to representatives destroys uniformity, citizenship and inhabitancy were defined by state law at the time of the Constitutional Convention.⁵¹ Therefore, these requirements were never uniform, but dependent upon the law in each of the states.

Moreover, what is absent from the Constitution, as well as its express terms, provides valuable insight into the meaning of Article I, Sections 2 and 3. One of the most interesting sections proposed by the Committee of Detail on August 6 was entirely rejected. In Article VI, Section 2, the Committee had set forth the power of the federal legislature "to establish such uniform qualifications of the members of each House, with regard to property, as to the

⁴⁹ *Id.* at 386.

⁵⁰ Some worried that foreign nations might seek to place their agents in Congress. *Id.* at 406. Others thought that too long or too short a time would penalize persons in some of the newer states. *Id.* at 407. Inhabitancy replaced residency because it was thought to be less ambiguous. *Id.* at 406-408. See also *id.* at 418-23.

⁵¹ Hills, *supra* n. 22, at 117-19.

said Legislature shall seem expedient."⁵²

It appears that Section 5 was written in light of Section 2 allowing "[e]ach House [to be] the judge of the elections, returns and qualifications of its own members."⁵³ The term "qualifications" was placed in Section 5 because each House would have to judge whether or not a member met the proposed property qualifications. Judging "qualifications" then only appeared to involve property and not the age, citizenship, and inhabitancy requirements of Article I, Sections 2 and 3.

Article VI, Section 2 was rejected in its entirety partly because of fear that one group would use its power to set property qualifications to exclude others.⁵⁴ In addition, it was thought that the section as written "would constructively exclude every other power from regulating qualifications."⁵⁵ The Convention then adopted Section 5 without comment and thereby left ambiguous what qualifications the Houses are to judge.

The discussion set forth above leads to several conclusions. First, the requirements of age, citizenship, and inhabitancy do not prevent the states from raising their own standards. Instead, these requirements were meant as minimum qualifications to protect the national legislature. In addition, the rejection of property qualifications while retaining Article I, Section 5, which allows each House to judge the qualifications of its members, was meant to allow the federal legislature to protect itself from domination by foreign or destructive forces.⁵⁶ It was

⁵² See Madison, *supra* n. 46 at 382.

⁵³ *Id.*

⁵⁴ *Id.* at 425-28.

⁵⁵ *Id.* at 428. (Comments of Wilson).

⁵⁶ *Id.* at 437-42.

not meant to prevent the states and their citizenry from adopting higher standards.

This perspective on the meaning of these sections is strengthened by the text of the Constitution as finally adopted by the Constitutional Convention. When the Committee on Style and Arrangement reported the Constitution to the delegates on September 12, 1787, the language of Article I, Sections 2 and 3 was written so as to suggest that the requirements set forth established a minimum base. Article I, Section 2 states, "No person shall be a Representative who shall not have attained to . . . and been . . . and who shall not, when elected, be an inhabitant of that state in which he shall be chosen."⁵⁷ Article I, Section 3 uses the same qualifiers. Thus, the language, "shall not have attained to" indicates that anyone not meeting these criteria is rendered incapable of serving in the respective House. If these requirements were meant to be exclusive, one would expect language explicitly excluding state power to add qualifications. See Article I, Section 10. This failure speaks all the more clearly because the Committee reworked the previous proposal of August 6th, which stated that members of the House "shall be of the age of twenty-five years at least; shall have been a citizen in the United States for at least three years before his election, and shall be, at the time of his election, a resident of the State in which he shall be chosen."⁵⁸ The "at least" wording indicates that the qualifications were minimal criteria. When one reads the penultimate version in light of the final wording of the Constitution and the meetings of the Constitutional Congress, one realizes that no basis exists for suggesting that the states could not place higher requirements on their representatives. This earlier version, the later ver-

⁵⁷ *Id.* at 616-17.

⁵⁸ *Id.* at 386.

sion, and the lack of comment on the change suggests that the requirements were minimum criteria.⁵⁹

None of the discussions at the Constitutional Convention reveal either that age, citizenship, and inhabitancy are exclusive qualifications or that states could not add requirements. Such a lack of evidence, at a Convention that was called in large measure to limit state power, is as determinative as history can be. If the delegates to the Constitutional Convention wanted to limit state power regarding qualifications, they would have done so. See, e.g., Prohibitions on states in Article I, Section 10. Therefore, even if Amendment 73 adds requirements rather than merely limits access to the ballot, it would be constitutional.

B. The State Ratifying Conventions

The debate over Article I, Sections 2 and 3 in the state ratifying debates stands in stark contrast to the breadth and ferocity of the argument over Article I, Section 4. A review of the recorded debates indicates that no discussion of Article I, Sections 2 and 3 occurred. Given the recorded discussion over Article I, Section 4, one would expect that state representatives would have objected to Article I, Sections 2 and 3 if they thought that it limited their power to establish additional qualifications. The absence of such debate indicates that the clause should not be so interpreted.

C. The Federalist Papers and Anti-Federalist Papers

No evidence exists in the public debates between the Federalists and Anti-Federalists supporting the view that states could not add requirements to those of age, citizenship, and inhabitancy. In fact, the debates parallel those at the Constitutional Convention that indicated that the requirements act as a floor, but are not exclusive.

⁵⁹ See Hills, *supra* n. 22, at 110-12.

In Federalist No. 52, James Madison began his defense of the requirements established for members of Congress. Madison justified these minimal requirements by arguing that the states retained the power to send persons of merit to Congress. He noted that the requirements for the House of Representatives were reasonable limitations by which "the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith."⁶⁰ Madison uses the metaphor of the open "door" to convince the states that the Constitution will not severely limit the states' power to send whomever they wish to Congress. As long as the elected representatives fit through the open door, Congress will not refuse to seat them.

Madison argued that these requirements "being less carefully and properly defined by the state constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention."⁶¹ This brief has already shown that these requirements were not uniform in fact.⁶² Nevertheless, Article I, Sections 2 and 3 do give the appearance of uniform requirements.

Madison's arguments in support of Article I, Sections 2 and 3 show that he was trying to convince the states to accept minimal requirements for legislators. Since the door would still be open, the states' power to send whomever it wished to Congress would not be significantly circumscribed by the Constitution. Few, if any, persons of merit would be excluded by the requirements of Article I, Sections 2 and 3.

⁶⁰ *The Federalist* No. 52.

⁶¹ *Id.*

⁶² See *supra* n. 51 and accompanying text.

This reading of Madison's position is strengthened by Article I, Section 5 which provides that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." This article allows Congress to decide whether or not someone can come through the door. It does not give Congress or the courts the power to prevent the states from attempting to send whomever they wish to serve them. In addition, Congress, not the courts, is given the power to judge whether or not a person has met the requirements established by the Constitution. This sense of how these two clauses work was reiterated by Madison in Federalist No. 53 when he stated that, "Each house is, as it necessarily must be, the judge of the elections, qualifications, and returns of its members."⁶³ If anyone is deemed to lack the requisite qualifications, the respective House can choose not to seat them. The actions of states in choosing whom to send to Congress is thus regulated by the respective House. Therefore, the courts need to act only if another part of the Constitution is implicated. No such implication arises from the enactment of Amendment 73 by the people of the State of Arkansas.

CONCLUSION

The judgment below should be reversed and the case remanded for an entry of judgment in favor of petitioners.

Respectfully Submitted,

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⁶³ *The Federalist* No. 53.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of Governor John Engler as Amicus Curiae supporting the petitioners has been served on all parties required to be served by first class mail, postage prepaid, addressed as follows:

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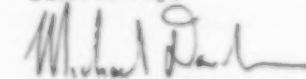
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Re: *U.S. Term Limits, Inc., et al. v. Thornton*,
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Dear Mr. Safranek:

On behalf of respondent Senator Dale Bumpers, we consent to your filing a brief as amicus curiae in this case.

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Dear Professor Safranek:

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Dear Mr. Suter:

On behalf of Petitioners, the State of Arkansas, ex
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Re: U.S. Term Limits, Inc. et al. v. Thornton and Bryant v.
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Dear Mr. Suter:

On behalf of Senator David Pryor, please be advised that we consent to the filing of any amicus curiae briefs in support of Petitioners U.S. Term Limits, Inc., et al. and/or the State of Arkansas.

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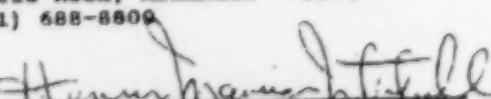
Dear Mr. Suter:

On behalf of Respondents The Democratic Party of Arkansas, Representative Ray Thornton and Representative Blanche Lambert, please be advised that we consent to the filing of any amicus curiae briefs in support of Petitioners U.S. Term Limits, Inc., et al. and/or the State of Arkansas.

Respectfully submitted,

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Re: U.S. Term Limits, Inc., et al.
 v. Thornton, Bryant v. Hill
 Nos. 93-1456 and 93-1828

Dear Mr. Suter:

On behalf of Respondents Bobbie Hill, on behalf of The League of Women Voters of Arkansas and Dick Herget please be advised that we consent to the filing of any amicus curiae briefs in support of Petitioners U.S. Term Limits, Inc., et al. and/or the State of Arkansas.

Yours truly,

Elizabeth J. Robben
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Re: U.S. Term Limits, Inc., et al. v. Thornton, Bryant v. Hill
 Nos. 93-1456 and 93-1828

Dear Mr. Suter:

On behalf of Respondents Steve Goss and Americans for Term Limits, please be advised that we consent to the filing of any amicus curiae briefs in support of Petitioners U.S. Term Limits, Inc., et al. and/or the State of Arkansas as well as any amicus curiae briefs in support of any Respondents.

Sincerely,

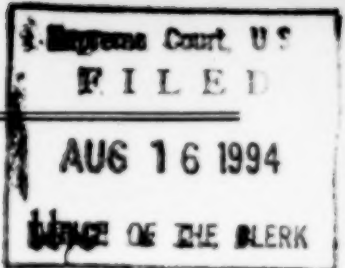
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10
No. 93 - 1456



In The
Supreme Court of
United States

October Term, 1994

U.S. TERM LIMITS, INC., ARKANSANS FOR
GOVERNMENTAL REFORM, INC., FRANK GILBERT,
GREG RICE, LON SCHULTZ, and SPENCER PLUMLEY,

Petitioners,

-against-

RAY THORNTON, BLANCHE LAMBERT,
DALE BUMPERS, DAVID PRYOR, *et al.*,

Respondents.

*On Writ of Certiorari to the
Supreme Court of Arkansas*

**BRIEF OF THE ALLIED EDUCATIONAL FOUNDATION
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

	Page
TABLE OF CASES AND AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	6
POINT I Legitimate State Interests Are Served By Amendment 73 And Similar Legislation	6
POINT II Amendment 73 Does Not Violate The Qualifications Clauses	12
A. The Qualifications Clauses Do Not Prescribe Characteristics Of The Candidacy, They Relate Only To Characteristics Of The Elected Individual	12

B.	Anti-Incumbent Ballot Restrictions Do Not Violate The Qualifications Clauses	13
1.	Term Limitations Are Not "Qualifications" . . .	13
2.	The Restrictions Contained In The Qualifications Clauses Are Not Exclusive	17
POINT III	The Adoption Of Amendment 73 Was Within The Sovereign Power Of The State Of Arkansas Under The Tenth Amendment	20
CONCLUSION		23

TABLE OF CASES AND AUTHORITIES

Page(s)

CASES

Federal

<i>American Labor Party of Texas</i> <i>v. White</i> , 415 U.S. 767 (1974)	15, 16, 20
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	6
<i>Burdick v. Takushi</i> , 112 S. Ct. 2059 (1992)	6
<i>Clements v. Fashing</i> , 457 U.S. 957 (1982)	16
<i>Garcia v. San Antonio Metropolitan</i> <i>Transit Authority</i> , 469 U.S. 528 (1985)	21
<i>Gregory v. Ashcroft</i> , 111 S. Ct. 2395 (1991)	21, 22
<i>Hopfmann v. Connolly</i> , 746 F.2d 97 (1st Cir. 1984), <i>vacated in part</i> , 471 U.S. 459 (1985)	14

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<i>Lubin v. Parish</i> , 415 U.S. 709 (1974)	20
<i>Munro v. Socialist Workers Party</i> , 479 U.S. 189 (1986)	15
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969)	4, 19, 20
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U.S. CONST., art. I, § 5, cl. 1	12, 13
U.S. CONST., art. IV, cl. 3	18, 19
U.S. CONST., Amendment I	4
U.S. CONST., Amendment X	3, 4, 5, 21, 22
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State

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REV. 97 (1991) 10

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26 CREIGHTON L. REV. 321 (1993) 17, 18
- George Will, *Overdrawn at The Ballot Box*,**
WASH. POST., Oct. 3, 1991 11

INTEREST OF THE AMICUS CURIAE

Allied Educational Foundation ("AEF") is a non-profit public interest group devoted to supporting the development of public policies that contribute to a free society in which the rights of individuals guaranteed by the United States Constitution are fully protected. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy, and has appeared as *amicus curiae* in the federal courts on a number of occasions. Supporters of AEF include representatives of business, labor and the general public.

It is the belief of AEF that true competition for elective office contributes to achieving good government and that a representative democracy is best served by facilitating the broadest access to the process of electing members of the United States Congress and the state legislatures. The ease with which private citizens are able to seek office, and the concern of elected officials for the general public, are severely impaired by an increasingly disproportionate capacity on the part of incumbents to be virtually immune from challenge.

AEF is concerned that a determination adverse to the petitioners will effectively contribute to the conversion of our legislative halls from bodies representative of different walks of American life to bodies increasingly characterized by professional legislators who make being legislators their lifetime vocation. Regrettably, this unfortunate circumstance is

exacerbated by the seniority system, which places disproportionate power in the hands of the career legislator. Legislative bodies in a democracy should consist of citizens from diverse backgrounds and vocations, not career bureaucrats whose only vocation is government.

By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief by AEF on behalf of petitioners.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Article I, § 2, cl. 2, and § 3, cl. 3, of the United States Constitution (the "Qualifications Clauses") provide, respectively, as follows:

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

2. The Tenth Amendment to the United States Constitution provides as follows:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

The issue presented in this appeal concerns the extent to which a State has the power to restrict the number of consecutive terms that a candidate for the United States Congress may appear on the ballot for re-election. Specifically at issue is Amendment 73 of the Arkansas Constitution (hereinafter referred to as "Amendment 73"), which was approved by the people of the State of Arkansas in a general election held on November 3, 1992. Amendment 73 provides, in pertinent part, that no candidate elected to three or more terms in the United States House of Representatives, or to two or more terms in the United States Senate, shall be eligible to have his or her name placed on the ballot for re-election to that office.

On March 7, 1994, the Arkansas Supreme Court issued five separate opinions in *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349 (Ark. 1994), none of which was joined by a majority of the Court. Nevertheless, five of the seven Justices concluded that those portions of Amendment 73 applying to candidates to the United

States Congress were unconstitutional in that they violated the Qualifications Clauses.¹ Relying principally on this Court's decision in *Powell v. McCormack*, 395 U.S. 486 (1969), the plurality found as follows:

[T]he Qualification clauses fix the sole requirements for congressional service. This is not a power left to the states under the Tenth Amendment. The attempt to add an additional criterion based on length of service is in direct conflict with the Qualification clauses

872 S.W.2d at 357. Nevertheless, the plurality acknowledged that Amendment 73 does not disqualify the long-term incumbent from seeking re-election, inasmuch as the candidate remains free to run as a write-in candidate or to be appointed by the Governor to fill a vacancy.

¹ In a separate aspect of the decision, the plurality held, *inter alia*, that term limitations imposed by Amendment 73 on state officeholders did not violate the First and Fourteenth Amendments of the United States Constitution.

SUMMARY OF ARGUMENT

The Framers of the United States Constitution intended that the people of the respective States have the power to pursue such courses as are necessary to elect to the United States Congress individuals who truly represent the will of the people. Yet, the concept of the "citizen legislator" has, to a great extent, been lost in the modern phenomenon of legislatures being essentially controlled by a self-perpetuating, professional aristocracy.

State initiatives, such as Amendment 73, that seek to limit the number of terms members of the United States Congress may serve by restricting access to the ballot are not offensive to the Constitution. In particular, proscribing access to the ballot based upon the length of a legislator's term in office does not constitute the type of restriction for which the Qualifications Clauses should be invoked. Moreover, even if this proscription were deemed a "qualification," it would, nevertheless, be permissible because the restrictions set forth in the Qualifications Clauses regarding age, residency and citizenship represent minimum, not exclusive, qualifications for elected officials to be seated in the Congress. Therefore, the people of the State of Arkansas were within their rights under the Tenth Amendment to restrict access to the ballot as a mechanism for limiting the inherent powers and institutional advantages of incumbents.

ARGUMENT

POINT I

LEGITIMATE STATE INTERESTS ARE SERVED BY AMENDMENT 73 AND SIMILAR LEGISLATION

Clearly, initiatives such as Amendment 73 are designed to make more difficult the efforts of long-term incumbents seeking re-election. Nevertheless, although the rights to seek election and to vote for the candidate of one's choice may be afforded the protection of the First and Fourteenth Amendments, those rights must be balanced against any legitimate state interests. See *Burdick v. Takushi*, 112 S. Ct. 2059, 2067 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).² The application of such a balancing analysis to the ballot restricting provisions of Amendment 73 fully justifies a finding upholding the constitutionality of the initiative, inasmuch as legitimate and significant state interests do, indeed, outweigh any individual rights that might be identified.

Having fought a revolution to separate the British Colonies of North America from a government ruled by an inherited monarchy and a self-perpetuating

² "Running for office is not a 'federal right' so as to require strict scrutiny of statute or state constitutional article placing restriction on qualifications for office." *Zielasko v. Ohio*, 873 F.2d 957, 959-60 (6th Cir. 1989).

aristocracy, it was the intention of the Framers of the Constitution to unite the sovereign states in a system under which the central government they were creating would be truly representative of the people who elected it. Long-term, or "entrenched," incumbency is a concept that is utterly foreign to such a federal system. This vision on the part of the Framers necessarily required a government in which the electorate would choose "citizen legislators"--that is individuals from different walks of life who would bring their personal and regional experience to the halls of Congress. What was not envisioned was a new ruling aristocracy, consisting of professional legislators who make remaining in public office their life's work, and who bring to the legislative halls none of the experiences of everyday life except being a worker in government. The power of incumbents to secure themselves in office for life has become so pervasive as to render the greater portion of Congressional power in the hands of a few, who function as the equivalent of peers for life, minimally exposed to challenge, and often above the will of the people.³

³ Indeed, these concerns were specifically enumerated by the citizens of the State of Arkansas in the following "Preamble" to Amendment 73:

The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less

It should also be noted that, at the time that the Framers established a minimum age of twenty-five years for service in the House of Representatives, and a minimum age of thirty years for service in the United States Senate, they did so in the context of a society in which life expectancy was well below fifty years of age. Implicit in the Framers' choice of age qualifications was a view that service in the legislative branch would rarely reach a decade in length. The efforts at term limitation constitute the expression of a desire on the part of the people to reverse the tide of long-term incumbency and to return the legislative branch of the federal government to the representative nature intended by the Framers of the Constitution.

Furthermore, since the drafting of the Constitution, technological advances have occurred that extend the resources of incumbent legislators far beyond those contemplated by the Framers. For example, incumbent legislators, on both the national and state levels, have conferred upon themselves a variety of expensive perquisites, funded by the taxpayers, which give to incumbents, with rare exception, an insurmountable advantage in the electoral process. These perquisites include free mailings and printings

representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of elected officials.

costing from ten to hundreds of thousands of dollars,⁴ publicly-funded telephone access to reach constituents, and substantial staffs, paid for by public funds, to indulge in activities designed to foster voter support. See generally Thomas E. Mann & Raymond E. Wolfinger, *Candidates and Parties in Congressional Elections*, in *CONTROVERSIES IN VOTING BEHAVIOR* at 268 (Richard G. Niemi & Herbert F. Weisberg eds.) (1984) ("even when information is scarce, incumbents are able to increase their visibility and improve their reputations by plying the tools of their trade: constituency service, news letters, direct mail, and so on"). As a result, incumbents generally have significantly greater name recognition than their opponents. *Id.* at 253.

Added to this publicly-funded advantage is the emergence of the visual and audio media as a primary source of information to the public. The existence of C-SPAN on cable television, for example, showing the procedures of Congress, gives incumbents an exposure advantage that few challengers could possibly afford to match.

In addition, Congress, itself, rewards long-term incumbency through seniority on committees and preferred committee appointments. "The electorate is then faced with a Hobson's choice of either supporting

⁴ See, e.g., Dennis Camire, *Lott Leads Delegation in Use of Free Mail Privilege*, GANNET NEWS SERV., June 26, 1992, at 1 (indicating totals of over \$50,000 in free mail for some members of Congress).

the long-term incumbent or losing its place in the queue for federal monies that would be otherwise located in its district by a senior representative." Roderick C. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. PITT. L. REV. 97, 144-45 (1991). See generally James C. Otteson, *A Constitutional Analysis of Congressional Term Limits: Improving Representative Legislation Under the Constitution*, 41 DE PAUL L. REV. 1 (1991) (describing the strong incentives voters naturally may have to re-elect incumbents merely to preserve their access to the spoils of seniority). In effect, Congress penalizes the citizens of a given state for voting against the incumbent, even though the opposition may be more popular and more capable.

Amendment 73 establishes a method for reducing the vast, and anti-democratic, advantages of the incumbent and re-establishes the even electoral playing field intended by the Framers of the Constitution. This Court has previously upheld state legislation designed to restore the status quo, where there existed an imbalance of power itself created by state regulation.⁵ In *United States Civil Service Commission v. National Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973), for example, the Court upheld the constitutionality of the "Hatch Act," which prohibited certain federal employees

⁵ "It simply restores the status quo that would exist absent a distortion in the political marketplace caused by government intervention--the inordinate influence of the current office holders who use the prerequisites of office to dictate the result of the election." Hills, *supra* at 146.

from taking "an active part in political management of in political campaigns," *id.* at 550, or from "[b]ecoming a partisan candidate for, or campaigning for, an elective public office." *Id.* at 578 n.21. The legitimate state interest underlying the legislation that was identified by the Court "was the conviction that the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine." *Id.* at 565.

Similarly among the principles underlying ballot restriction legislation such as Amendment 73 is that elections in which one side is heavily subsidized by the government are poor indicators of actual popularity.⁶ Thus, the fact that long-term incumbency can be criticized for the lethargy, inactivity and elitism it can produce, as well as for its anti-democratic tendency, provide ample justification for initiatives such as Amendment 73.⁷

⁶ Given these government subsidies to incumbents, the criticism that term limitations "are undemocratic" because they limit voter choice makes little sense. See *id.* (citing George Will, *Overdrawn at the Ballot Box*, WASH. POST, Oct. 3, 1991).

⁷ Parenthetically, under the system of checks and balances established in the Constitution, the need for term limitations in the legislative branch of the federal government is just as important, and just as basic, as the need to immunize the judiciary from the politics of the electoral process.

POINT II**AMENDMENT 73 DOES NOT VIOLATE
THE QUALIFICATIONS CLAUSES****A. The Qualifications Clauses Do Not Prescribe
Characteristics Of The Candidacy, They
Relate Only To Characteristics Of The Elected
Individual**

Both of the Qualifications Clauses begin with the phrase "[n]o person shall *be* a [representative or senator]." U.S. CONST., art. I, § 2, cl. 2 and § 3, cl. 3 (emphasis added). Plainly, such language relates only to service in the Congress, not to an election campaign. As Chief Justice Cracraft of the Arkansas Supreme Court amply explained, "the Qualifications Clauses protect only the right of a person who meets the qualifications of age, citizenship, and residency to be seated in the Congress if elected." *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 369 (Ark. 1994) (Cracraft, C.J., concurring in part, dissenting in part).

This construction of the Qualifications Clauses is fully supported by the language of Section 5 of Article I of the Constitution, which provides, in pertinent part: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members" U.S. CONST., art. I, § 5, cl. 1. That provision gives enforcement power to each House of Congress, which might be necessary in the event that an individual were elected to a federal legislative position with less than the

minimum requirements set forth in the Qualifications Clauses. Thus, for example, it would not be unconstitutional for a state to permit a twenty year old individual from running for the House of Representatives; it would, however, be unconstitutional for that individual, once elected, to assume such an office. (And, the above-quoted provision of Section 5 of Article I would make the House of Representatives "the Judge" of whether the individual was, in fact, less than twenty-five years old, the minimum age prescribed for Representatives in Article I, § 2, cl. 2.)

B. Anti-Incumbency Ballot Restrictions Do Not Violate The Qualifications Clauses

If ballot restricting forms of term limitation initiatives do not raise the specter of "qualifications" for office, then their adoption should not require invocation of the Qualifications Clauses.

1. Term Limitations Are Not "Qualifications"

By holding that the ballot restriction prescribed in Amendment 73 constitutes a qualification for office (and, therefore, is violative of the Qualification Clauses), the Arkansas Supreme Court confused the concepts of "qualification" and "restriction." As the First Circuit Court of Appeals has held:

The test to determine whether or not the "restriction" amounts to a "qualification"

within the meaning of Article I . . . is whether the candidate "could be elected if his name were written in by a sufficient number of electors."

Hopfmann v. Connolly, 746 F.2d 97, 103 (1st Cir. 1984) (quoting *State v. Crane*, 197 P.2d 864, 871 (Wyo. 1948)), *vacated in part on other grounds*, 471 U.S. 459 (1985). Indeed, this holding echoed that of the Nebraska Supreme Court:

[T]he question is not whether he may be a candidate, but whether he may . . . have his name printed on the ballot at the state's expense. He may be a candidate and if electors write his name on the ballot in sufficient numbers he will be elected. . . . The state statute in no manner seeks to add other qualifications. It does not prevent him from being a candidate. It is not unconstitutional.

State ex rel. O'Sullivan v. Swanson, 127 Neb. 806, 808-09, 257 N.W. 255, 255-56 (1934). *Accord Public Citizen, Inc. v. Miller*, 992 F.2d 1548 (11th Cir.), *aff'g based on decision in* 813 F. Supp. 821, 832 (N.D. Ga. 1993) (rejecting claim that state statute--prescribing that no candidate for public office, including United States Senate, may be seated unless he or she received a majority of the votes cast--violated the Qualifications Clauses); *Joyner v. Mofford*, 706 F.2d 1523, 1531 (9th Cir.), *cert. denied*, 464 U.S. 1002 (1983); *Heavey v.*

Chapman, 93 Wash. 2d 700, 611 P.2d 1256 (1980); *State ex rel. McCarthy v. Moore*, 87 Minn. 308, 92 N.W. 4 (1902); see also *Stack v. Adams*, 315 F. Supp. 1295, 1298 (N.D. Fla. 1970) (recognizing the importance of the distinction between a complete bar to election and a mere "strong practical deterrent to election").

In *Storer v. Brown*, 415 U.S. 724 (1974), this Court considered the constitutionality of a California law that denied ballot access to congressional candidates who had been affiliated with a political party within one year of the election. In upholding the state statute, this Court rejected the argument that the law violated the Qualifications Clauses:

Appellants also contend that [the state law] purports to establish an additional qualification for office of Representative and is invalid under Art. I, § 2, cl. 2, of the Constitution. This argument is wholly without merit. . . . The non-affiliation requirement no more establishes an additional requirement for the office of Representative than the requirement that the candidate win the primary to secure a place on the general ballot or otherwise demonstrate substantial community support.

Id. at 746 n.16. Cf. *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (barring from ballot candidates not receiving minimum vote in the primary); *American Labor*

Party of Texas v. White, 415 U.S. 767 (1974) (barring from ballot candidates without sufficient petition support).

Similarly, the provisions of Article 73 deliberately relate only to ballot restriction, not to a proscription against the incumbent's running for re-election. Accordingly, the initiative simply does not rise to a level that would implicate the Qualifications Clauses.

At worst, this initiative represents a temporary disability on current officeholders. As such, it is not substantively different from the Texas regulation, upheld by a plurality of this Court in *Clements v. Fashing*, 457 U.S. 957 (1982), which required state justices of the peace to serve out their terms before running for state legislative office. What amounted to a minimum two-year "waiting period" was characterized in the opinion by (then) Justice Rehnquist as a "*de minimis* burden on the political aspirations of a current officeholder." *Id.* at 967. "A 'waiting period' is hardly a significant barrier to candidacy." *Id.* (citing *Storer v. Brown*, 415 U.S. 724, 733-37 (1974)).

On its face, Amendment 73 might be viewed as erecting nothing more than a waiting period analogous to that approved by the Court in *Clements*. The citizens of the State of Arkansas have merely required that, once a federal legislator has achieved a certain term of incumbency (six years for a Representative, and twelve years for a Senator), he or she must wait at least one term before being returned to the ballot. On that basis

alone, the initiative should be upheld as posing a *de minimus* burden on the incumbent. The incumbent can return to his or her usual vocation for a two-year period before again seeking to represent his or her community.

2. The Restrictions Contained In The Qualifications Clauses Are Not Exclusive

The language used by the Framers in the Qualifications Clauses, and the structure of the Constitution itself, provide no basis for the conclusion that the restrictions prescribed in those clauses are exclusive. Early drafts of the Constitution apparently contained a variety of proposed restrictions on the characteristics that would be prescribed for the President, Senators and members of the House of Representatives. See Stephen J. Safranek, *Term Limitations: Do the Winds of Change Blow Constitutional?*, 26 CREIGHTON L. REV. 321, 350-51 (1993). As the list of characteristics grew, one member of the Constitutional Convention of 1787 noted, "It was impossible to make a complete [list], and a partial one would by implication tie up the hands of the Legislature from supplying the omissions." JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 374 (Ohio Univ. Press 1984), *quoted in* Safranek, *supra* at 351.

If the Framers viewed term limitations as a mere detail not worthy of being cast in the stone of the Constitution, they must have viewed the imposition of such limitations as a subject that was left to such future action as the public deemed advisable, without

burdening the topic with a need to amend the Constitution. The obvious reason for the age, citizenship and residency requirements contained in the Qualifications Clauses was to protect Congress from immature or foreign influence. "To assume that the stated qualifications were exclusive is to misunderstand the reasons for establishing qualifications. The federal government wanted to prevent states from electing under qualified people to federal office, not to prevent states from adding to these qualifications as each state saw fit." Safranek, *supra* at 352.

The fact that the language in the Qualifications Clauses is expressed in the negative ("[n]o Person shall be a [representative or senator] . . ."), rather than in the affirmative (for example, "a person may be a representative or senator only if . . ."), further buttresses the notion that the clauses were designed to prescribe minimum qualifications beyond which the states were free to add. Such a construction is, indeed, supported by a reading of the Constitution, as a whole. For example, the Religious Test Clause prohibits both federal and state governments from imposing a religious test as a "qualification" for federal office.⁸ If the age, citizenship

⁸ The Religious Test Clause provides as follows: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any office or public Trust under the United States." U.S. CONST., art. VI, cl. 3.

and residency requirements prescribed in the Qualifications Clauses were considered exclusive, then the Religious Test Clause would be unnecessary, at least with respect to federal legislators.

The Court below was, therefore, incorrect in its reliance upon this Court's decision in *Powell v. McCormack*, 395 U.S. 486 (1969), to draw the conclusion that the Qualifications Clauses were intended to prescribe an exclusive list of characteristics for federal legislators. In *Powell*, the House of Representatives attempted to refuse to seat Representative Adam Clayton Powell, following his re-election, on the ground that he had wrongfully diverted federal funds to himself, his wife and members of his staff. This Court invalidated the House's action on the ground that the House had effectively added a new "qualification" to the three (age, citizenship and residency) set forth in the Qualifications Clauses. *Id.*

In addressing the issues in *Powell* a quarter of a century ago, the Court was viewing what appeared to be unfair treatment with respect to an African-American member of Congress. It is, indeed, questionable whether, if this issue were revisited today, the Court would reaffirm that Congress must go through the charade of first seating an electee before pursuing his or her removal for having, in a prior term, diverted funds.

In any event, the decision in *Powell* did not address the authority of the states to impose certain requirements, beyond the three set forth in the

Qualifications Clauses, on candidates for federal legislative positions. It is, therefore, respectfully suggested that *Powell* was, or should be, limited, at most, to its holding that *Congress* lacks authority to refuse to seat an individual who has been duly elected to office by his or her state and who meets the minimum requirements contained in the Qualifications Clauses. As set forth in Point III below, it is, under the Tenth Amendment, left up to the states to supplement the Qualifications Clauses by imposing any additional requirements not barred by some other provision of the Constitution.

POINT III

THE ADOPTION OF AMENDMENT 73 WAS WITHIN THE SOVEREIGN POWER OF THE STATE OF ARKANSAS UNDER THE TENTH AMENDMENT

This Court has consistently invoked the 14th Amendment to strike down legislation restricting access to the ballot that is based upon some invidious form of discrimination or unequal treatment. *See, e.g., American Labor Party of Texas v. White*, 415 U.S. 767 (1974); *Lubin v. Parish*, 415 U.S. 709 (1974); *Williams v. Rhodes*, 393 U.S. 23 (1968). Implicit in these holdings was the fact that, prior to the adoption of the 14th Amendment, the power to fix such restrictions (and, therefore, the power to restrict access to the ballot based upon any factors other than age, citizenship and residency) must have been reserved to the States.

Indeed, the Court has held that the states' "role in the selection both of the Executive and the Legislative Branches of the Federal Government" is a tool in the political process by which the citizens of the various states protect themselves from the federal government. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 551 (1985).

The extent to which the structure of the Federal Government itself was relied on to insulate the interests of the States is evident in the views of the Framers. James Madison explained that the Federal Government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments."

Id. (quoting THE FEDERALIST No. 46, at 332 (James Madison (B. Wright ed. 1961))).

In this vein, the Court has recognized that, under the Tenth Amendment, the powers that "remain in the State governments are numerous and indefinite." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991) (quoting THE FEDERALIST No. 45, at 292-93 (James Madison) (C. Rossiter ed. 1961)). In so doing, the Tenth Amendment ensures a decentralized governmental structure "that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic

processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Id.* Indeed, these are some of the same policies that Amendment 73 is designed to further.

As a logical and general rule of constitutional interpretation mandated by the Tenth Amendment, limitations on the powers of the States should not be imposed, as a plurality of the Court below did, based upon inferences drawn from silence in the Constitution. Thus, even if the ballot access restrictions contained in Amendment 73 were deemed to create additional "qualifications" for office, they are provisions that should be permitted, inasmuch as the Constitution nowhere mandates that states may not add such qualifications to the three minimum standards set forth in the Qualifications Clauses.

CONCLUSION

For the foregoing reasons, the Order of the Court below should be reversed, and Amendment 73 of the Arkansas Constitution should be declared a valid exercise of the rights of the people of the State of Arkansas that is in no way offensive to the United States Constitution.

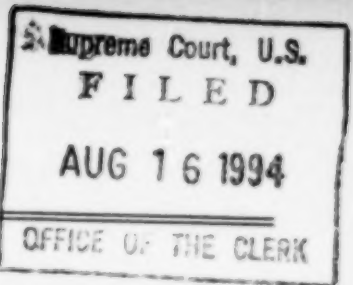
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11

No. 93-1456



In The
Supreme Court of the United States
October Term, 1994

U.S. TERM LIMITS, et al.,

Petitioners,

v.

RAY THORNTON, et al.,

Respondents.

On Writ Of Certiorari To The
Supreme Court Of Arkansas

AMICI CURIAE BRIEF OF ALASKA COMMITTEE
FOR A CITIZEN CONGRESS, IDAHOANS FOR
TERM LIMITS, NEVADANS FOR TERM LIMITS,
LIMIT, LIMITS, AND NORTHWEST LEGAL
FOUNDATION IN SUPPORT OF PETITIONER

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508

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT.....	1
ARGUMENT	2
A. Under the 10th Amendment the people of the respective states retain the authority to estab- lish qualifications for Congressional candi- dates.....	2
1. The language of §§ 2 and 3 permits the states to establish additional qualifications for their representatives	3
2. The framers and ratifiers of the Constitu- tion believed that the people in their respective States retained the right to add qualifications	6
3. Denying the people of the states the right to add qualification would frustrate sound public policy	10
B. Qualifications established by the people within the states must be non-discriminatory, must not severely restrict associational rights, and must be rationally related to important inter- ests	13
1. The Arkansas term limits do not discrimi- nate invidiously.....	16
2. The Arkansas term limits do not severely restrict associational freedoms.....	17
3. The Arkansas term limits further important interests in a rational manner	17
CONCLUSION	20

TABLE OF AUTHORITIES

	Page
CASES	
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	14
<i>Bullock v. Carter</i> , 405 U.S. 134 (1972)	17
<i>Burdick v. Takushi</i> , 112 S.Ct. 2054 (1992)	14
<i>Clements v. Flashing</i> , 457 U.S. 957 (1982)	17
<i>Delluth v. Muth</i> , 491 U.S. 545 (1989)	3
<i>Finley v. United States</i> , 490 U.S. 545 (1989)	3
<i>Garcia v. San Antonio Metropolitan Transit Authority</i> , 469 U.S. 528 (1985)	2
<i>Gregory v. Ashcroft</i> , 111 S.Ct. 2395 (1991)	3, 15
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat) 316 (1819)	10
<i>New State Ice Co. v. Liebmann</i> , 285 U.S. 262 (1932)	12
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969)	6, 7
<i>Socialist Labor Party v. Rhodes</i> , 290 F. Supp. 983 (S.D. Ohio 1968)	17
CONSTITUTIONAL PROVISIONS	
U.S. Const., Art. I, § 2	passim
U.S. Const., Art. I, § 3	passim
Tenth Amendment	1
Fourteenth Amendment	13

TABLE OF AUTHORITIES - Continued

	Page
BOOKS AND TREATISES	
<i>Annals of Congress</i> (1807)	6
<i>Basic Writings of Thomas Jefferson</i> (P. Froner, ed. 1944)	5
J. Story, <i>Commentaries on the Constitution of the United States</i> (1928)	13
<i>Congressional Record</i> (1947)	12
G. Wood, <i>The Creation of the American Republic, 1776-1787</i> (1969)	13
Elliot, <i>Debates on the Constitution in the Several State Conventions</i> (1987 ed.)	7, 8
Farrand, <i>The Records of the Federal Convention of 1787</i> (1966 ed.)	6
<i>The Federalist</i> (C. Rossiter, ed. 1961)	7, 8
<i>The Founders' Constitution</i> (P. Kurland and R. Lerner, eds. 1987)	9
<i>The Writings of Thomas Jefferson</i> (1853)	8
ARTICLES, PAMPHLETS, AND NEWSPAPERS	
Amar, <i>Philadelphia Revisited: Amending the Consti- tution Outside Article V</i> , 55 Chi. L. Rev. (1988)	7
Cohen & Spitzer, <i>Term Limits</i> , 80 Geo. L. J. 477 (1992)	9
Fund, <i>Term Limitations: An Idea Whose Time Has Come</i> (Cato Institute Policy Analysis No. 141, Oct. 30, 1990)	9

TABLE OF AUTHORITIES – Continued

	Page
Gorshuck and Guzman, "Will the Gentlemen Please Yield?" A Defense of State Imposed Term Limitations, 20 Hofstra L. Rev. 341 (1991)	16
Kristol, <i>Term Limitations: Breaking Up the Iron Triangle</i> , 16 Harv. J.L. & Pub. Pol. 95 (1993)	9
Los Angeles Times (May 18, 1990, at p. B7).....	9
Nightline: <i>Congressional Term Limits</i> (ABC Television Broadcast, November 4, 1991).....	11
Note, <i>The Constitutionality of State-Imposed Term Limits Under the Qualifications Clause</i> , 71 Tex. L. Rev. 865 (1993)	9
Rapaczgnski, <i>From Sovereignty to Process: The Jurisprudence of Federalism After Garcia</i> , 1985 Sup. Ct. Rev. 341.....	3
Richardson, <i>Congressional Tenure: A Review of Efforts to Limit House and Senate Service</i> (Congressional Service Report for Congress, Sept. 13, 1994).....	12

I. STATEMENT OF INTEREST

This brief is filed on behalf of several organizations who support the imposition of further qualifications upon the Congressional representatives of their respective states. These organizations are Alaska Committee for a Citizen Congress, Idahoans for Term Limits, Nevadans for Term Limits, LIMITS (based in Oregon), and LIMIT (based in Washington).

The qualifications, either proposed or enacted, supported by these groups are similar to the qualifications at issue in this case. Those qualifications are that certain incumbents are prohibited from appearing on ballots. This court's ruling on the constitutionality of the qualifications in this case will affect the qualifications provisions supported by the above amici.

The party filing this amicus brief is the Northwest Legal Foundation (NLF), a non-profit public interest law firm. It has filed amicus briefs with this court in several cases, including *Dolan v. Tigard*, No. 93-518, and *Pacific Northwest Venison Producers v. Smitch*, No. 94-20, both supporting the petitioner.

II. SUMMARY OF ARGUMENT

The Constitution does not prohibit the enactment of further qualifications imposed by states upon their Congressional candidates. Sections 2 and 3 of Article I do not prohibit the states from imposing further qualifications from those listed, and the 10th Amendment authorizes state action where the Constitution does not prohibit it.

This comports with the framers' and ratifiers' understanding of the Constitution. To prohibit imposition of such qualifications would frustrate sound public policy. Finally, the Arkansas term limits meet the requirements states must meet when imposing additional qualifications upon Congressional candidates.

III. ARGUMENT

A. Under the 10th Amendment the people of the respective states retain the authority to establish qualifications for Congressional candidates.

The 10th Amendment underscores and embodies one of the fundamental principles of the American political regime: the national government is a government of delegated powers, and all governmental powers not specifically delegated to it are retained by the states or the people. In accordance with this principle, the framers of the Constitution adopted a federal structure in which the national government was granted exclusive authority in a few areas. In all other areas, however, the states retained either exclusive, initial, or concurrent authority. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this Court recognized that the federal structure was best preserved through the political process – including, specifically, the states' "role in the selection . . . of the . . . Legislative Branch of the Federal Government." *Id.* at 551.

The States can preserve their influence within the federal structure, however, only if the few powers they are granted in the political process are construed broadly. See generally, Rapaczgnski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 Sup. Ct. Rev. 341, 391 (purely formal enforcement of state authority over the political process will not preserve state sovereignty). If the states cannot establish reasonable qualifications for those who represent them in Congress and thereby insure that their representatives do "represent", they are denied a significant procedural power by which to protect themselves in the political process. Consequently, whenever state power over the political process is at issue, this Court should adopt that construction of the Constitution which least circumscribes state authority. Cf. *Delluth v. Muth*, 491 U.S. 223 (1989); *Finley v. United States*, 490 U.S. 545 (1989). Specifically, this Court should construe §§ 2 and 3 of Art. I to permit the states, through popular amendment of their constitutions, to establish additional qualifications for their Congressional representatives.

1. The language of §§ 2 and 3 permits the states to establish additional qualifications for their representatives.

Sections 2 and 3 do clearly establish minimum qualifications for Congressional representatives which the states cannot alter. Equally clearly, they do not preclude the states from adopting additional, compatible qualifications. Cf. *Gregory v. Ashcroft*, 111 S.Ct. 2395 (1991). ("The authority of a States' people to determine the qualifications of their most important government officials lies at

the heart of representative government . . . and is reserved under the Tenth Amendment . . . ")

In areas such as these where the framers contemplated that the national and state governments would both exercise authority, the Constitution often specifies minimal rules which the states must observe and by implication leaves to the states discretionary authority to establish other, constitutionally permissible rules. Thomas Jefferson considered §§ 2 and 3 illustrative of this pattern. Asked whether the States could add any qualifications to those which the Constitution had prescribed for their members of Congress, he replied that they could. He reasoned:

Had the constitution been silent, nobody can doubt but that the right to prescribe all the qualifications and disqualification's of those they would send to represent them, would have belonged to the State. So also the constitution might have prescribed the whole, and excluded all others. It seems to have preferred the middle way. It has exercised the power in part, by declaring some disqualifications, to wit, those of not being twenty-five years of age, of not having been a citizen seven years, and of not being an inhabitant of the State at the time of election. But it does not declare, itself, that the member shall not be a lunatic, a pauper, a convict of treason, of murder, of felony, or other infamous crime, of a non-resident of his district; nor does it prohibit to the State the power of declaring these, or any other disqualifications which its particular circumstances may call for; and these may be different in different States. Of course, then, by the tenth amendment, the power is

reserved to the State. If, wherever the constitution assumes a single power out of many which belong to the same subject, we should consider it as assuming the whole, it would vest the General Government with a mass of powers never contemplated. On the contrary, the assumption of particular powers seems an exclusion of all not assumed.

Basic Writings of Thomas Jefferson 725 (P. Froner, ed. 1944).

The text of §§ 2 and 3 permits this interpretation, as Congressman Randolph of Virginia pointed out in 1807. Debating a House committee report on the right of a Mr. McCreery to sit in the House, Randolph understandably expressed surprise that the Committee on Elections had construed § 2 of Art. I to preclude "the States from annexing qualifications to a seat in the House of Representatives." He rebuked the Committee (whose report the House did not adopt):

Mark the distinctions between the first and the second paragraphs. The first is affirmative and positive. "They shall have the qualifications necessary the electors of the most numerous branch of the State Legislature." The second merely negative. "No person shall be a Representative who shall not have attained the age of twenty-five years," & c. No man could be a member without these requisites; but if did not follow that he who had them was entitled to set at naught such other requisites as the several States might think proper to demand. If the Constitution had meant (as was contended) to have settled the qualification of members, its words would have naturally ran thus: "Every person who has attained the age of twenty-five

years, and been seven years a citizen of the United States, and who shall, when elected, be a inhabitant of the State from which he shall be chosen, shall be eligible to a seat in the House of Representatives." But so far from fixing the qualifications of members of that House, the Constitution merely enumerated a few disqualifications within which the States were left to act.

Speech of John Randolph, 17 *Annals of Congress*, 883-4 (1807).

Indeed, as Congressman Randolph probably knew, the delegates to the Constitutional Convention had refused to make the qualifications specified in § 2 and 3 exclusive when they deleted the phrase "and any person possessing these qualifications may be elected" from one of the original proposals.

2. The framers and ratifiers of the Constitution believed that the people in their respective states retained the right to add qualifications.

More specifically, the legislative history of §§ 2 and 3 suggests that both the framers and ratifiers of the Constitution thought that the states retained the right to set term limits for their Congressional representatives. This Court has surveyed much of the legislative history in *Powell v. McCormack*, 395 U.S. 486 (1969), and correctly concluded that neither the framers nor the ratifiers wanted Congress (and perhaps, by extension, state legislatures) to have the power to establish additional qualifications. Madison, for example, considered such a power "improper and dangerous". 2 Farrand, *The Records of the Federal Convention of*

1787 250 (1966). And Hamilton emphasized the importance of "fixing" the qualifications of the office holders in a constitution. *The Federalist*, No. 60, at 361 (C. Rossiter, ed. 1961). Neither of these concerns, however, suggests that the people in their respective states ought not to be able to fix qualifications in their respective constitutions, so long as the additional qualifications are compatible with those specified in §§ 2 and 3 and are otherwise constitutionally permissible.

Moreover, recognizing that the people in the states have the power to add additional qualifications is consistent with the reason the delegates to the constitutional convention most likely declined to include additional qualifications (including the principle of rotation in office) to those of age, citizenship, and residency. The delegates simply wanted to constrict as little as possible the freedom of the people to choose their own representatives. See e.g. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 320 (1987 ed.). ("The people are the best judge of whom ought to represent them" [speech of Robert Livingstone].) Thus, this Court in *Powell v. McCormack* wisely left open the question of whether the people in the states could add qualifications.

This Court should now recognize that the people may limit their own, otherwise untrammelled, power to elect whom they wish. Cf. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1044 (1988). After all, a term limit may be one of the "effectual precautions" by which, according to Madison, the people can keep their representatives "virtuous whilst they continue to hold their public trust." *The Federalist*,

No. 57, at 350-1 (C. Rossiter, ed. 1961). To deny them that power in the name of preserving their sovereignty would be Orwellian. The people of Arkansas, exercising that sovereignty, have decided that they want to experiment with the principle of rotation in office and have voted to exclude from their ballot Senators who have served two terms and Representatives who have served three terms.

There is every reason to believe that the founding generation would endorse their decision in the circumstances in which they now find themselves. The framers, after all, generally subscribed to the idea that rotation in office was a good thing. Indeed, Jefferson thought the failure to include it in the Constitution was one of that document's two principal flaws (the other was the absence of a Bill of Rights). Letter from Jefferson to Madison, dated December 20, 1787, 2 *The Writings of Thomas Jefferson* 330 (1853). Similarly, George Mason, who had been a delegate to the Constitutional Convention, considered "periodical rotation essential to the preservation of republican government." 3 Elliot, *The Debates on the Adoption of the Federal Constitution* 485 (2nd ed. 1937). And in *The Federalist Papers* Madison conceded that tenure "for a limited period" was a defining characteristic of representatives in a republican government. *The Federalist*, No. 39, at 241 (C. Rossiter, ed. 1961).

The framers nevertheless saw no need to specify term limits in the Constitution because they assumed frequent elections would insure regular turnover in the membership of both houses. Madison, for example, predicted that "new members would always form a large proportion" of the House. 5 Elliot, *The Debates on the Adoption of the Federal Constitution* 225 (1836). One Anti-federalist

thought two-thirds of the House would be new each term. 2 *The Founders' Constitution* 51 (P. Kurland and R. Lerner, eds. 1987).

Election patterns in the century following the adoption of the Constitution justified the assumption of the founding generation. In the first Congressional election after General Washington was elected, forty percent of the incumbents were defeated. J. Fund, *Term Limitation: An Idea Whose Time Has Come* 3 (Cato Institute, Policy Analysis No. 141, October 30, 1990). It was not until the 57th Congress convened in 1901 that the percentage of new members dipped below 30%. By the time the 101st Congress convened in 1989, only 8% were new members. *Id.* at 4. Incumbents who choose to stand for re-election are virtually assured of winning. In 1986, for example, 98% of Congressional incumbents who stood for re-election won. In 1990, the rate "dropped" to "only" 96%. Cohen & Spitzer, *Term Limits*, 80 Geo. L. J. 447, 479 (1992). It "plummeted" in the 1992 elections to 88%. Note, *The Constitutionality of State Imposed Term Limits Under the Qualification Clauses*, 71 Tex. L. Rev. 865, 866 (1993). Whether 98% or 88%, these rates are dramatically higher than the framers and ratifiers anticipated.

Indeed, the rates are so high that Congressional office has become a sinecure. In one recent year more Congressmen were carried out of office in coffins than were sent packing by the voters. Kristol, *Term Limitations: Breaking Up the Iron Triangle*, 16 Harv. J. L. & Pub. Pol. 95, 97 (1993). And in another, almost as many were hauled off to jail as were defeated at the polls. Los Angeles Times, May 18, 1990, at B7 ("Since 1988, six Congressmen went home,

and five were sentenced to the slammer"). This unfortunate pattern constitutes one of those crises which even "the most gifted of [the Constitution's] begatters" could not have foreseen; and this Court should heed the Great Chief Justice's admonition and construe the Constitution to enable the current generation to deal with the crisis, so long as the text and original understanding permit. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819).

3. Denying the people of the states the right to add qualification would frustrate sound public policy.

To deny the people of Arkansas the right to set term limits for their Senators and Representatives leaves them only two alternatives. They may simply refuse the vote for any incumbent, a choice they of course have every constitutional right to make. That choice would require them, however, to ignore all other political considerations, including, among others, the candidate's party affiliations, character, and position on the issues of the moment. The people of Arkansas might also reasonably fear that in deciding for whom to vote, they would too often succumb to short term pressures and discount, in any particular campaign, the long term value of the principle of rotation in office. Patrick Henry anticipated the dilemma when he warned the delegates to the Virginia Ratification Convention:

The only semblance of a check on incumbents is the negative power of not re-electing them. This sir is but a feeble barrier, when their personal interest, their ambition and awareness come to

be put in contrast with the happiness of the people.

3 Elliot, *The Debates on the Adoption of the Federal Constitution* 167 (1836). The people of Arkansas might thus prefer to adopt a self-denying ordinance, as all prudent political communities do. Cf. *Nightline: Congressional Term Limits*, ABC Television Broadcast, November 4, 1991. (Commenting on votes who complain about Congress but continue to vote for incumbents, Jeff Greenfield said: "It's almost as if the voters are saying: Stop me before I re-elect again.") Only term limits insure respect for the principle of rotation in office while allowing citizens as individual voters to act on all the other political considerations they deem relevant in every campaign.

Alternatively, Arkansas voters could reach out to their fellow voters across the country and demand a constitutional amendment that limited the number of terms which Congressmen could serve (much like the 22nd Amendment, which limits the President to two terms). But why should the people of Arkansas be required to resort to the arduous and probably futile task of seeking a Constitutional amendment to achieve this end, and why should the people in every state be required to observe the same policy?

The particular futility of trying to set term limits through constitutional amendment is self-evident, given the pivotal role Congress has historically played in the amendment process. Sitting Congressmen have a vested interest in preserving their right to run for re-election. Not surprisingly, they have bottled up every one of the over 100 proposed term limit amendments submitted

since 1975. Richardson, *Congressional Tenure: A Review of Efforts to Limit House and Senate Service* 7 (Congressional Research Service Report for Congress, Sept. 13, 1994). Only once in the country's entire history – in 1947 – has a term limits amendment reached the floor of the Congress. It garnered one vote. 93 *Cong. Rec.* 1963 (1947). It is inconceivable that those members of the founding generation who feared congressional control over qualifications would have given that very body a de facto veto over qualifications endorsed by the people of the states. Prudent men all, they would never have entrusted the chicks to the tender mercies of the fox.

Moreover, the states should not be forced to resort to constitutional amendments in order to test the value of new qualifications like term limits. That raises the cost of political change far too high and effectively destroys the states as the useful laboratories Brandeis envisioned. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting). ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens chose, serve as a laboratory and try out novel social and economic experiments without harm to the country.") If the states are required to resort to constitutional amendment, they will be able to try out far fewer ideas and may be "stuck" far too long with those that turn out to be mistaken.

Happily, the question of term limits for Senator and Representatives is not a subject, like term limits for the President, which requires a uniform rule. Admittedly, the states do have a collective interest in insuring that no state sends to the Congress persons who do not meet certain minimum qualifications. Once those are satisfied,

however, individual states may have particular interests in adding additional qualifications to insure that their Senators and Representatives serve them well. Importantly, one state's adding qualifications to those prescribed in §§ 2 and 3 neither imposes costs on other states nor precludes them from adding different qualifications of their own.

There is certainly no reason to suppose, as some have suggested, that uniform qualifications will insure that Senators and Representatives reflect "national" rather than parochial concerns. More to the point, Congressmen should reflect, to some degree at least, the views of their constituents. Some might even think that was their responsibility. John Adams declared: "[The Legislature] should be in miniature an exact portrait of the people at large. It should think, feel, reason, and act like them." G. Wood, *The Creation of the American Republic, 1776-1787* 165 (1969). Nor is there any longer any need to fear, as did Justice Story, that a state might adopt qualifications that discriminated on the basis of religious views or occupation. Justice Story, *Commentaries on the Constitution of the United States* 99 (1928). The 14th Amendment would now prohibit the states from imposing any such qualifications.

B. Qualifications established by the people within the states must be non-discriminatory, must not severely restrict associational rights, and must be rationally related to important interests.

Although the people of the States retain the power under the 10th Amendment to add qualifications, the 14th Amendment circumscribes that power. This Court

has never evaluated the constitutional legitimacy of a qualification. It has, however, decided innumerable ballot access cases. In that process it has established a test which it should use in the present case. The Court summarized that test in *Anderson v. Celebreeze*, 460 U.S. 780, 789 (1983), instructing lower courts to weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." More recently, in *Burdick v. Takushi*, 112 S.Ct. 2059 (1992), this Court elaborated on that balancing test:

Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions the regulation must be "narrowly drawn to advance a state interest of compelling importance. . . ." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. (Internal citations omitted.)

This standard would generally and wisely eschew strict scrutiny.

Few, if any, qualifications could satisfy a strict scrutiny standard. Qualifications are necessarily bright line rules, and such rules are always over and under inclusive. That is true, for example, of the age, citizenship, and residency qualifications in §§ 2 and 3 of Art. I. An age requirement may tend to insure maturity of judgment; but some younger persons may have mature judgment, and some older persons may lack it. Similarly, a citizenship requirement may tend to insure attachment to the country; but some who have been citizens for a brief period may love the country equally or more, and others who have been citizens forever may still lack any patriotic commitment. Residency requirements may tend to insure familiarity with the people of a state and their values and needs, but they similarly exclude some who are sufficiently informed and include others who know nothing about the state.

Since that is the nature of qualifications, all a court can reasonably demand is that qualifications be rationally related to some important purpose. In other words, this Court should ask whether the people of Arkansas could rationally consider some period of Congressional service a general indicator that such persons would no longer serve their interests as effectively as other persons without that length of service, recognizing that a term limit qualification-like the age, citizenship, and residency qualifications- is necessarily somewhat over and under inclusive. See *Gregory v. Ashcroft*, *supra*. (The classification cannot be overturned unless the "facts on which the classification is apparently based could not reasonably be conceived to be true" by the people.)

The Court could insist, however, that a qualification serve an important or significant purpose. That insistence would reflect a realization that if qualifications could be added too easily or too often, they might cumulatively circumscribe too greatly the freedom of the people to choose those whom they wish to represent them. (In that connection, the Court might note that the Arkansas term limit provision will exclude far fewer candidates than do the age, citizenship, or residency qualifications of §§ 2 and 3.)

1. The Arkansas term limits do not discriminate invidiously.

Amendment 73 is clearly non-discriminatory. It does not discriminate on the basis of ethnicity, race, national origin, gender, sexual orientation, religion, age, physical condition, mental state, wealth, or political view. It discriminates solely on the basis of a person's prior service in the Congress; and despite Mr. Twain's quip that the Congress is the only permanent criminal class in America, this Court has never held that Senators and Representatives constitute a suspect or semi suspect class. They are in fact the antithesis of such classes. They are overwhelmingly male, predominantly white, and generally affluent. Gorshuch and Guzman, "Will the Gentleman Please Yield?" *A Defense of State Imposed Term Limitations*, 20 Hofstra L. Rev. 341, 372 (1991). (Congress is 95% male and 93% white, and 1 out of 10 Representatives and 1 out of 4 Senators are millionaires.)

2. The Arkansas term limits do not severely restrict associational freedoms.

While Amendment 73 does affect certain associational rights, the ones that it directly impacts – the rights to run for office and to vote for a particular candidate – are not fundamental. *Clements v. Flashing*, 457 U.S. 957, 963 (1982) (candidacy for public office is not a fundamental right); *Bullock v. Carter*, 405 U.S. 134, 143 (1972) (regulations that "limit the field of candidates from which voters might choose" are not subject to strict scrutiny).

More importantly, the Amendment's write-in provision largely vitiates the impact of term limits on these rights. Those who have served the prescribed limits may still mount write-in campaigns. Because of their name recognition, political connections, and record of service, incumbents are especially well situated to wage such campaigns successfully. And voters continue to have the right to vote for whomever they please *Socialist Labor Party v. Rhodes*, 290 F.Supp. 981, 987 (S.D. Ohio 1968) ("A write-in ballot permits a voter to effectively exercise his individual constitutionally protected franchise.")

3. The Arkansas term limits further important interests in a rational manner.

Term limits are an idea whose time has come. They are intended to serve a variety of important purposes. They may encourage new people with fresh ideas to enter politics. They may encourage representatives to fashion public policy on the basis of principle. They may reduce the influence of money in political campaigns. They may

prevent the growth of a permanent political class more interested in preserving their privileges than in serving the needs of their constituents. The latter is certainly a concern which the framers and ratifiers of the Constitution would have considered, not just legitimate or even important, but compelling.

A people committed to the idea that robust democracy depends upon rotation in office could find no more effective means to achieve that goal than term limits. The people of Arkansas declared in the preamble of the initiative they adopted that "entrenched incumbency has reduced voter participation and has led to an electoral system that is less free than the system established by the Founding Fathers." The use of term limits to preserve "government of the people, by the people, for the people" has a long and honorable history in the country. Many states currently enforce term limits for state officials, and the 22nd Amendment underscores the rationality of term limits as an effective check on tyranny.

Of course, term limits may fail to restore the kind of representative democracy that the Founding Fathers envisioned. Term limits may also entail perverse consequences. States that adopt term limits may find themselves disadvantaged *vis a vis* other states because of the Congressional seniority system. Congressmen may not have sufficient time to acquire expertise in complicated areas of public policy. The entrenched bureaucracy may become all-powerful. If any or all of these consequences materialize, the people of Arkansas remain free, of course, to junk term limits through the same process by which they adopted them.

The point is not whether term limits pass some kind of judicial cost-benefit analysis but whether the citizens of Arkansas ought to have the right to try them. In short, the desirability of term limits should be fought out on the political playing fields of the country. The U.S. Supreme Court has no business refereeing that fight, beyond insisting that such provisions respect associational rights, be non-discriminatory, and rationally serve some important interest(s) of the people.

This is then a case whose decision requires the Court to recur to first principles. The first principle of the American political regime is that the people are sovereign. If "governments are instituted among men" for the purpose of securing their "unalienable rights" and "the people" have "the right to alter or abolish" any government "whenever [it] becomes destructive of these ends," surely the people of Arkansas may exercise the lesser right of imposing term limits on their Congressmen in the hope of making their Senators and Representative responsive to them, their wants, and their needs.



IV. CONCLUSION

The Constitution does not prohibit the imposition of further qualifications by states upon their Congressional candidates. The people of Arkansas should be allowed to exercise their sovereignty and experiment with term limits for their Congressional candidates.

DATED: August 16, 1994

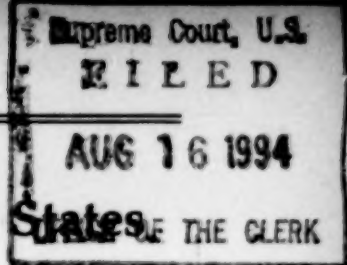
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In The
Supreme Court of the United States
October Term, 1994

U.S. Term Limits, Inc., Arkansas For Governmental
Reform, Inc., Frank Gilbert, Greg Rice,
Lon Schultz, and Spencer Plumleg,

Petitioners,

vs.

Ray Thornton, Blanche Lambert, Dale Bumpers,
David Pryor, et al.,

Respondents.

State of Arkansas ex rel. Winston Bryant,
Attorney General of the State of Arkansas,

Petitioner,

vs.

Bobbie E. Hill, et al.,

Respondents.

**On Writ Of Certiorari To The
Supreme Court Of Arkansas**

**BRIEF OF THE STATES OF NEBRASKA,
CALIFORNIA, COLORADO, CONNECTICUT,
DELAWARE, FLORIDA, GEORGIA, HAWAII,
KANSAS, KENTUCKY, MASSACHUSETTS,
MONTANA, NEW HAMPSHIRE, OHIO, SOUTH
DAKOTA, TENNESSEE AND WYOMING AS AMICI
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QUESTIONS PRESENTED

1. Whether the Ninth and Tenth Amendments and the Guarantee Clause preserve the ability of the people of the States to enact election provisions denying ballot access to multi-term Congressional incumbents.
2. Does Article I of the Constitution forbid a state to decline to print on its election ballots the names of multi-term incumbents in the House of Representatives and Senate?
3. Whether a state has the power under the Elections Clause of the Constitution, Art. I § 4, Cl. 1, to restrict an incumbent candidate's access to the ballot in the manner of Amendment 73 to the Arkansas Constitution, or whether the Qualifications Clauses of the Constitution, Art. I § 2, and § 3, prohibit a state from imposing such a ballot access restriction.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	4
SUMMARY OF ARGUMENT	4
ARGUMENT	4
I. STATE ELECTION PROVISIONS DENYING BALLOT ACCESS TO MULTI-TERM CONGRES- SIONAL INCUMBENTS ARE A LEGITIMATE EXERCISE OF STATE SOVEREIGNTY UNDER THE TENTH AMENDMENT	4
A. Introduction	4
B. State Powers Under The Tenth Amendment Are Numerous And Indefinite	5
C. The Tenth Amendment Must Be Applied As A Rule Of Constitutional Construction	8
D. The Power To Control Ballot Access And The Election Process Is Reserved To The States ...	10
1. Application of the Tenth Amendment to the Qualifications Clauses Reveals That States Retain Power to Regulate Ballot Access	10
2. The States have a Significant Interest in Regulating Ballot Access which is Pro- tected by the Tenth Amendment	15
3. Prior Case Law Supports State Control of Ballot Access	17
4. The Exercise of Sovereignty by States over Ballot Access is not without Defined Limits	18

TABLE OF CONTENTS - Continued

	Page
II. VOTER INITIATED RESTRICTIONS THAT DENY BALLOT ACCESS TO MULTI-TERM INCUMBENTS ARE A LEGITIMATE EXERCISE OF THE RIGHTS RESERVED TO THE PEOPLE UNDER THE NINTH AND TENTH AMEND- MENTS AND THE GUARANTEE CLAUSE	19
A. The Tenth Amendment Reserves To The Peo- ple Substantial Control Over The Selection Of Their Congressional Representatives	20
B. The Ninth Amendment Protects The People From Denial Or Disparagement Of Retained Rights Including The Right To Control The Selection Of Their Congressional Represen- tatives	21
C. The Guarantee Clause Ensures The Peoples' Right To Select Their Own Representatives ...	26
CONCLUSION	29

TABLE OF AUTHORITIES

Page

CASES

<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1982)	17, 18
<i>Baker v. Carr</i> , 369 U.S. 186 (1962)	16, 29
<i>Bernal v. Fainter</i> , 467 U.S. 216 (1984)	27
<i>Duggan v. Beermann</i> , 245 Neb. 907, 515 N.W.2d 788 (1994)	3
<i>Colegrove v. Green</i> , 328 U.S. 549 (1946)	29
<i>Coleman v. Thompson</i> , 111 S.Ct. 2546 (1991)	20
<i>Collector v. Day</i> , 78 U.S. 113, 124-25 (1870), <i>overruled on other grounds by Graves v. New York ex rel. O'Keefe</i> , 306 U.S. 466 (1939)	9
<i>Coyle v. Smith</i> , 221 U.S. 559, 565 (1911)	29
<i>Garcia v. San Antonio Metropolitan Transit Authority</i> , 469 U.S. 528 (1985)	8, 17, 19
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991)	passim
<i>Hunter v. Erickson</i> , 393 U.S. 385 (1969)	18
<i>In re Duncan</i> , 139 U.S. 449 (1891)	27
<i>Miles v. Apex Marine Corp.</i> , 498 U.S. 19 (1990)	14
<i>New York v. U.S.</i> , 505 U.S. ___, 112 S.Ct. 2408 (1992)	5, 6, 7, 9, 20, 27
<i>Oregon v. Mitchell</i> , 400 U.S. 112 (1970)	25
<i>Powell v. McCormick</i> , 395 U.S. 486 (1969)	23

TABLE OF AUTHORITIES - Continued

Page

<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	29
<i>State ex rel. O'Sullivan v. Swanson</i> , 127 Neb. 806, 247 N.W. 255-256 (1934)	17
<i>Storer v. Brown</i> , 415 U.S. 724 (1973)	17
<i>Texas v. White</i> , 7 Wall 700, 19 L.Ed.2d 227 (1869)	6
<i>Thorsted v. Gregoire</i> , 841 F.Supp. 1068 (W.D.Wash. 1994)	3
<i>U.S. v. Edwards</i> , 745 F.Supp. 1477 (D.Minn. 1990)	18, 25
<i>U.S. Term Limits, Inc. v. Hill</i> , 316 Ark. 251, 872 S.W.2d 349 (1994), <i>cert. granted by U.S. Term Limits, Inc. v. Thornton (Ray)</i> , ___ S.Ct. ___, 1994 WL 101102, 62 USLW 3835 (1994), and <i>cert. granted by Bryant (Winston) v. Hill (Bobbie E.)</i> , ___ S.Ct. ___, 1994 WL 210019, 62 USLW 3835 (1994)	3

CONSTITUTIONAL PROVISIONS

U.S. Const., art. I § 1	22
U.S. Const., art. I § 2	4, 8, 22, 25
U.S. Const., art. I § 3	4, 8, 22
U.S. Const., art. I § 4	12, 15, 18
U.S. Const., art. I § 8	15, 22
U.S. Const., art. I § 10	15
U.S. Const., art. II § 1	22

TABLE OF AUTHORITIES – Continued

	Page
U.S. Const., art. II § 2	22
U.S. Const., art. III § 1	22
U.S. Const., art. III § 2	22
U.S. Const., art. III § 3	22
U.S. Const., art. IV § 3	22
U.S. Const., art. IV § 4	26, 27
U.S. Const. art. V	16
U.S. Const. amend. I	23
U.S. Const. amend. II	23
U.S. Const. amend. IV	23
U.S. Const. amend. VI	23
U.S. Const. amend. VII	23
U.S. Const. amend. IX	<i>passim</i>
U.S. Const. amend. X	<i>passim</i>
U.S. Const. amend. XIV	23, 25
U.S. Const. amend. XV	23, 25
U.S. Const. amend. XVII	25
U.S. Const. amend. XIX	23, 25
U.S. Const. amend. XXIV	23, 25
U.S. Const. amend. XXVI	23, 25

TABLE OF AUTHORITIES – Continued

	Page
STATE CONSTITUTIONAL PROVISIONS	
Ariz. Const. art. VII, § 18 (West Supp. 1993)	1
Ark. Const. amend. 77 (Michie Supp. 1993) ...	1, 26, 30
Colo. Const. art. XVIII, § 9a (West Supp. 1993)	1
Fla. Const. art. 6, § 4 (West Supp. 1994)	1
Mass. Const. of 1780, art. I, part 1	15
Mich. Const. art. II, § 10 (Michie Supp. 1994)	1
Mo. Const. art. III, § 45(a) (West Supp. 1994)	1
Mont. Const. art. IV, § 8 (1993)	1
Neb. Const. art. XV, § 20 (Supp. 1993)	1
Ohio Const. art. V, § 8 (Supp. 1993)	1
Ore. Const. art. II, § 20 (1993)	1
S.D. Const. art. III, § 32 (Michie Supp. 1994)	1
STATUTES	
Cal. Elec. Code § 25003 (West Supp. 1994)	1
Ga. Act of Jan. 23, 1789, p. 247	14
N.C. Act of Dec. 16, 1789, ch. 1, § I	14
N.D. Cent. Code §§ 16.1-01-13, 16.1-01-13.1, 16.1-01-14 (Michie Supp. 1993)	1
Va. Act of Nov. 20, 1788, ch. 2, § II	14
Wash. Rev. Code §§ 29.68.015-016 (West Supp. 1994)	1
Wyo. Stat. § 22-5-104 (Michie Supp. 1993)	1

TABLE OF AUTHORITIES - Continued

Page

OTHER AUTHORITIES

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1989 S.D. Laws H.J.R. 1001	1
<i>Blackstone's Commentaries</i> , St. George Tucker, 1:App. 185-87 (1803)	8
<i>The Debates in The Several State Conventions On The Adoption Of The Federal Constitution</i> 131 (S. Elliott ed. 1836) (remarks by John Adams)	7
2 <i>Debates on the Federal Constitution</i> 257 (J. Elliot ed. 1876) (remarks of A. Hamilton)	30
<i>The Federalist</i> No. 17 at 119, (A. Hamilton) (C. Rossiter ed. 1961)	16
<i>The Federalist</i> No. 39 at 245 (J. Madison) (C. Rossi- ter ed. 1961)	29
<i>The Federalist</i> No. 45 at 292-293 (J. Madison) (C. Rossiter ed. 1961)	7
<i>The Federalist</i> No. 46 at 298 (J. Madison) (C. Rossi- ter ed. 1961)	16
<i>The Federalist</i> No. 51 at 323 (J. Madison) (C. Rossi- ter ed. 1961)	20
2 <i>The Founders' Constitution</i> 81 (Phillip Kurland & Ralph Lerner eds. 1987)	13

TABLE OF AUTHORITIES - Continued

Page

5 <i>The Founders' Constitution</i> 404 (Philip B. Kurland & Ralph Lerner eds. 1987)	8
Fuller, A.H., <i>The Tenth Amendment Retires</i> , 41 A.B.A.J. 223 (1941)	22
Guzman, Neil and Gorsuch, Michael, <i>Will the Gen- tlemen Please Yield? A Defense of the Constitu- tional of State Imposed Term Limits</i> , 20 Hofstra L.Rev. at 377	16, 17
Hills, Roderick M., Jr., <i>A Defense of State Constitu- tional Limits on Federal Congressional Terms</i> , 53 U.Pitt.L.Rev. 97, 149	17, 19, 24
Kobach, Kris W., <i>Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments</i> , 103 Yale L.J. 1971 (1994)	1
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Messonnier, Terrence M., <i>A Neo-Federalist Inter- pretation of the Tenth Amendment</i> , 25 Akron L.Rev. 213, 214 (Summer 1991)	7
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<i>The Oxford English Dictionary</i> (2d ed. 1989)	21
Petracca, Mark P., <i>A New Defense of State-Imposed Congressional Term Limits</i> , in 26 PS: <i>Political Sci- ence and Politics</i> 700, 702 (Dec. 1993)	12
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TABLE OF AUTHORITIES – Continued

	Page
Petracca, Mark P., <i>Rotation in Office: The American Experience</i> , in 1 <i>Long Term View</i> 33, 39-42 (Winter 1992).....	2
Safranek, Stephen J., <i>Term Limitations: Do The Winds of Change Blow Unconstitutional?</i> , 26 <i>Creighton L.Rev.</i> 321, 384-385 (1993).....	5
Tribe, Laurence H., <i>American Constitutional Law</i> § 5-20 at p. 379 (2d ed. 1988).....	9
Warren, Charles, <i>The Making of the Constitution</i> 412-426 (1928)	12, 13, 14, 15
Will, George F., <i>Restoration: Congress, Term Limits and the Recovery of Deliberative Democracy</i> 73-83 (1992)	2, 29

INTEREST OF AMICI CURIAE

The Petitioner, State of Arkansas, through its Attorney General, Winston Bryant, is asking the Court to affirm the Constitutionality of an amendment to its State Constitution – enacted through popular initiative by the state's voters – which restricts an incumbent member of Congress' access to the printed ballot after serving a specified number of terms in office. *See* Ark. Const. amend. 73 (Appendix at pp. 2-4). Arkansas' provision is not unique. Since 1990, 15 states have passed various ballot access restrictions or term limits for members of Congress – all through citizen initiative.¹ (These fifteen State laws are set forth in their entirety in an Appendix submitted to the Court with this brief of the amici curiae States.). Similar measures are expected to be on the ballots in as many as seven additional states in 1994, and on the ballot in at least one more state in 1995.²

¹ See Ariz. Const. art. VII, § 18 (West Supp. 1993); Ark. Const. amend. 73 (Michie Supp. 1993); Cal. Elec. Code § 25003 (West Supp. 1994); Colo. Const. art. XVIII, § 9a (West Supp. 1993); Fla. Const. art. 6, § 4 (West Supp. 1994); Mich. Const. art. II, § 10 (Michie Supp. 1994); Mo. Const. art. III, § 45(a) (West Supp. 1994); Mont. Const. art. IV, § 8 (1993); Neb. Const. art. XV, § 20 (Supp. 1993); N.D. Cent. Code §§ 16.1-01-13, 16.1-01-13.1, 16.1-01-14 (Michie Supp. 1993); Ohio Const. art. V, § 8 (Supp. 1993); Ore. Const. art. II, § 20 (1993); S.D. Const. art. III, § 32 (Michie Supp. 1994); Wash. Rev. Code §§ 29.68.015-016 (West Supp. 1994); Wyo. Stat. § 22-5-104 (Michie Supp. 1993). No state legislature has passed a congressional term limits law, although both South Dakota and Utah have passed resolutions calling for a constitutional convention to enact a congressional term limits amendment to the U.S. Constitution. 1990 Utah Laws S.J.R. No. 24; 1989 S.D. Laws H.J.R. 1001.

² See Kris W. Kobach, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 Yale L.J. 1971 (1994).

The Arkansas ballot access provision has its historical antecedent in the "rotation" principle which predates the United States Constitution.³ The principle of rotation was observed by a majority of the U.S. Congress throughout most of the Nineteenth Century.⁴ However, during the Twentieth Century, a major historical shift to entrenched incumbency began to appear. Turnover rates in the House of Representatives, for example, declined from a high of 76% in 1842 to only 7.6% in 1988.⁵

As a result, the States have become increasingly concerned about the accountability of their representatives in Congress as well as the growing imbalance of power between the State and Federal governments in contravention of the Constitutional Framers' clear intent. The States and the people have focused on various incumbency restrictions as a means to address this problem. The States, including the State of Arkansas, have exercised their discretion to establish different mechanisms for attempting to reintroduce rotation. Some States, such as the Petitioner State of Arkansas, have enacted laws that restrict the ability of incumbents to have their names printed on official ballots after a specified period of time

³ "[I]n America . . . by the term rotation in office . . . we mean an obligation on the holder of that office to go out at a certain period." Thomas Jefferson, *quoted in* Mark P. Petracca, *Rotation in Office: The History of an Idea, in Limiting Legislative Terms* 20 (Gerald Benjamin and Michael Malbin eds., 1992).

⁴ Mark P. Petracca, *Rotation in Office: The American Experience, in 1 Long Term View* 33, 39-42 (Winter 1992).

⁵ See George F. Will, *Restoration: Congress, Term Limits and the Recovery of Deliberative Democracy* 73-83 (1992) (tables of statistics showing that incumbent retention rates and the length of Congressional incumbency have increased dramatically).

(hereinafter "ballot access restrictions"). Others have enacted various types of limits on the number of terms a member of Congress may serve (hereinafter "term limits").

Since the November 1992 elections, court decisions in Washington and Nebraska, as well as the instant Arkansas decision, have invalidated incumbency restriction provisions.⁶ The Washington decree is currently on appeal in the Ninth Circuit. Nebraska citizens have recently resubmitted petitions containing over 130,000 signatures, seeking to once again place a ballot access proposal on the November ballot.⁷

Because the determination of the validity of ballot access restrictions raises significant questions about a State's role in the election of its congressional delegation, the issue is one of vital importance to all the States and their citizens. The Amici States urge the Court to recognize the States' reserved power to enact restrictions on incumbents' access to the ballot and uphold Amendment 73.

⁶ See *Thorsted v. Gregoire*, 841 F.Supp. 1068 (W.D.Wash. 1994); *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 872 S.W.2d 349 (1994), *cert. granted by U.S. Term Limits, Inc. v. Thornton (Ray)*, ___ S.Ct. ___, 1994 WL 101102, 62 USLW 3835 (1994), and *cert. granted by Bryant (Winston) v. Hill (Bobbie E.)*, ___ S.Ct. ___, 1994 WL 210019, 62 USLW 3835 (1994); *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994) (decided on state law grounds only).

⁷ In April, the Nebraska Supreme Court had invalidated the previous proposal on state law grounds for the lack of a sufficient number of petition signatures. See *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994).

SUMMARY OF ARGUMENT

The Constitutional text, historical evidence, and fundamental principles of federalism compel the Court to uphold State election provisions denying ballot access to multi-term congressional incumbents as legitimate exercises of State sovereignty under the Tenth Amendment and also of the rights retained by the people under the Ninth and Tenth Amendments and the Guarantee Clause.

ARGUMENT

I. STATE ELECTION PROVISIONS DENYING BALLOT ACCESS TO MULTI-TERM CONGRESSIONAL INCUMBENTS ARE A LEGITIMATE EXERCISE OF STATE SOVEREIGNTY UNDER THE TENTH AMENDMENT.

A. Introduction

These consolidated cases present the question of whether a State has the power to enact restrictions on access to the printed ballot by multi-term Congressional incumbents, or whether such restrictions are prohibited by the Qualifications Clauses of Article I, §§ 2, 3 of the Constitution of the United States. This question cannot be properly adjudicated without the careful consideration of the Tenth Amendment and its role in interpreting the Qualifications Clauses and the Election Clause.

Unlike the Tenth Amendment cases which have come before the Court in recent years, this case does not concern the scope of Congressional power or whether Congress has exceeded its enumerated powers. Rather, it concerns the reserved power of the States and the retained right of the people to control the selection of their governmental representatives. The Tenth Amendment explicitly reserves such power to the States, and to the people.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X.

The bedrock question before the Court, then, is whether the ability of the States to enact election provisions denying ballot access to multi-term Congressional incumbents is an attribute of State sovereignty reserved by the Tenth Amendment. *See New York v. U.S.*, 505 U.S. ___, ___, 112 S.Ct. 2408, 2417 (1992). The amici curiae States firmly believe the Constitutional text, historical evidence, and fundamental principles of federalism and republican government compel an affirmative answer.⁸

B. State Powers Under The Tenth Amendment Are Numerous And Indefinite.

The Framers of the Constitution understood the benefits of dividing power between the Federal and State

⁸ The issue before the Court is one of far reaching significance to the States. As one commentator has stated, How the Court decides this issue not only will reveal how it reads the Constitution, but also will indicate where it sees itself in the scheme of American politics. If the view of state power articulated in *Gregory [v. Ashcroft]*, 501 U.S. 452, 111 S.Ct. 2395 (1991)) outlines a skeleton perspective of the Court, term limitations [and ballot access restrictions] will provide a critical case for adding flesh to those bones.

Stephen J. Safranek, *Term Limitations: Do The Winds of Change Blow Unconstitutional?*, 26 Creighton L.Rev. 321, 384-385 (1993). This case represents an important milestone in the centuries old judicial struggle to reconcile the competing demands of state sovereignty and national supremacy. *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism For A Third Century*, 88 Columbia L.Rev. 1 (1988).

governments, and purposely formed a system of dual sovereignty. See *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (quoting *Texas v. White*, 7 Wall. 700, 725, 19 L.Ed.2d 227 (1869)). As James Madison stated, "In the Compound Republic of America . . . a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself". *The Federalist* No. 51 at 323 (J. Madison) (C. Rossiter ed. 1961) (emphasis added).⁹ To ensure this double security to the rights of the people, State sovereignty must be vigilantly guarded. As the Court stated in *Gregory*,

If this "double security" is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty.

Gregory v. Ashcroft, 501 U.S. at 459 (1991). This balance of power would indeed be dangerously tilted if the fundamental right of the people to choose their representatives to the Federal Congress from the respective States is construed narrowly so as to deny State control of ballot access.¹⁰

In essence, the Court must in this case discern the core of sovereignty retained by the States under the Tenth Amendment with respect to selection of the States' representatives to the Federal Congress. *New York v. U.S.*, 112

⁹ This Court has, in recent years, more fully recognized the importance of Madison's "double security". *New York v. U.S.*, 112 S.Ct. 2408 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

¹⁰ The Court has recognized that the Tenth Amendment demands meaningful analysis beyond the text of the Amendment itself when applied to a question of constitutional law. *New York v. U.S.*, 112 S.Ct. at 2418.

S.Ct. at 2419. In making this discernment, the States may not be viewed as powerless entities against which all doubts should be construed in the area of sovereignty. As the Court has recognized, "States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government". *New York v. U.S.*, 112 S.Ct. at 2434.¹¹

The extent of State sovereignty, even prior to its expression in the Tenth Amendment, was aptly described by James Madison:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . .

The Federalist No. 45 at 292-293 (J. Madison) (C. Rossiter ed. 1961) (emphasis added).¹² In sum, the States retain

¹¹ "The Constitution 'leaves to the several States a residuary and inviolable sovereignty' . . . reserved explicitly to the States by the Tenth Amendment." *New York v. U.S.*, 112 S.Ct. at 2434-2435 (quoting *The Federalist* No. 39 at 245 (J. Madison) (C. Rossiter ed. 1961)). While the entire constitutional scheme is designed to establish Federalism as a system of Government, the Tenth Amendment is designed to protect the States' powers and the People's rights as the ultimate source of all governmental power. Even the staunchest Federalists believed the Tenth Amendment was a device for limiting federal overreaching and guaranteeing preservation of state autonomy. See 2 *The Debates in The Several State Conventions On The Adoption Of The Federal Constitution* 131 (S. Elliott ed. 1836) (remarks by John Adams).

¹² The lack of an express provision reserving nondelegated powers to the States was, perhaps, the largest single issue in the ratification of the Constitution. Terrence M. Messonnier, *A Neo-Federalist Interpretation of the Tenth Amendment*, 25 Akron L.Rev. 213, 214 (Summer 1991). The importance and scope of the powers reserved to the States have been discussed in cases

numerous and indefinite powers while the federal government's sovereignty "is an emanation from [the States], not a flame by which [the States] have been consumed". 5 *The Founders' Constitution* 404 (Philip B. Kurland & Ralph Lerner eds. 1987) (quoting St. George Tucker, *Blackstone's Commentaries*, 1:App. 185-87 (1803)).

C. The Tenth Amendment Must Be Applied As A Rule Of Constitutional Construction.

The Tenth Amendment must be applied as a rule of constitutional construction in analyzing whether State enacted ballot access restrictions violate the Qualifications Clauses of Article I, §§ 2 and 3.

presenting questions much farther from the core of State sovereignty than the present case. The following relevant discussion is found in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

In our federal system, the States have a major role that cannot be pre-empted by the National Government. As contemporaneous writings and the debates at the ratifying conventions make clear, the States' ratification of the Constitution was predicated on this understanding of federalism. Indeed, the Tenth Amendment was adopted specifically to ensure that the important role promised the States by the proponents of the Constitution was realized.

Much of the initial opposition to the Constitution was rooted in the fear that the National Government would eliminate the States as viable political entities. This concern was voiced repeatedly until proponents of the Constitution made assurances that a Bill of Rights, including a provision explicitly reserving powers in the States, would be among the first business of the new Congress.

Garcia, 469 U.S. 528, 568 (Powell J.; Burger C.J.; Rehnquist, J.; and O'Connor, J., dissenting).

It is a *familiar rule of construction* of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, *this rule of interpretation is expressly declared in the tenth article of the amendments. . . .*

Collector v. Day, 78 U.S. 113, 124-25 (1870), *overruled on other grounds* by *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 486 (1939) (emphasis added). *See also New York v. U.S.*, 112 S.Ct. at 2418.

The Tenth Amendment makes clear a fundamental tenet of the federalist plan adopted by the Framers: While the federal government is one of delegated powers, the States are presumptive holders of powers not otherwise allocated in the constitutional plan. According to the clear language of the Tenth Amendment, therefore, there are only two available choices: Is the power being exercised (1) a power delegated by the Constitution to the federal government, or (2) a power retained by the States or the people? If it is not the first, then it must be the second. Thus, the status of the States as holders of reserved powers requires that the Tenth Amendment be applied as a rule of constitutional construction in interpreting the Qualifications Clauses.¹³

¹³ *See also* Laurence H. Tribe, *American Constitutional Law* § 5-20 at p. 379 (2d ed. 1988).

D. The Power To Control Ballot Access And The Election Process Is Reserved To The States.

1. Application of the Tenth Amendment to the Qualifications Clauses Reveals That States Retain Power to Regulate Ballot Access.

The issue in this case compels a direct examination of the scope of State sovereignty in the foundational area of selection of the States' representatives to the Federal Congress.¹⁴ At the heart of state sovereignty are the political processes through which the people express their will.¹⁵

In *Gregory*, the Court held that States must be free from external interference in the selection of state officials.

Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. "It is obviously essential to the independence of the States, and to their peace and tranquility,

¹⁴ As explained above, the Tenth Amendment must be applied as a rule of constitutional construction. Ignoring the Tenth Amendment, Respondent reads the Elections Clause and Qualifications Clauses as if they encompassed the complete extent of the law on the respective topics. Such a method of interpretation is clearly prohibited by the Ninth and Tenth Amendments and ignores the fundamental fact that the federal government is one of limited delegated power.

¹⁵ This Court has previously discussed closely related concepts.

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; and it allows for innovation and experimentation in government.

Gregory, 501 U.S. at 458.

that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, *except so far as plainly provided by the Constitution of the United States.*"

Gregory, 501 U.S. at 460 (quoting *Taylor v. Beckham*, 178 U.S. 548, 570-571 (1900)) (emphasis added). The amici curiae States believe these same constitutional principles apply equally to the selection of representatives from the States to the Federal Congress. Except so far as "plainly provided" by the Constitution of the United States, States must be free to regulate the election process for their own representatives to Congress. U.S. Const. amend. X.

In applying the Tenth Amendment to the Qualifications Clauses, it is helpful to first consider the rotation principle as it existed at the time of the Constitution's founding. Rotation in office was widely considered to serve three primary and essential functions: (1) to check tyranny and the abuse of public power, (2) to increase opportunity for citizens to serve in public office, and (3) to enhance the accountability and the overall quality of representation in Congress.¹⁶

Although widely supported, rotation was not *mandated* in the Constitution. This may be so for at least three reasons: (1) the requirement of rotation had been difficult to enforce under the Articles of Confederation (which had called for the annual appointment of delegates, provided for their recall at any time, and set limits on the length of time a delegate could hold office), (2) delegates thought it unnecessary (given short terms, the doctrine of instruction, and other checks that had been built into the Constitution such as federalism and the separation of

¹⁶ See Petracca, note 3, *supra* at 26-28. See also definition of rotation, note 3, *supra*.

powers), and (3) the common practice of voluntary rotation in many of the states (which may have persuaded the delegates that rotation in office would be the norm in the new national government, even without an explicit constitutional requirement).¹⁷ Moreover, convention delegates understood the Constitution to be setting forth only minimal qualifications necessary for national office. Other matters, such as rotation in office, ballot access, or term limits, were consequently left for the States to determine.¹⁸

Although rotation was not mandated in the Constitution, the Framers of the Constitution, as evidenced by the record of debate, clearly intended to ensure representativeness and responsiveness in those elected to the Federal "Legislature".¹⁹ The Framers were careful to see that the States retained the power to regulate the election of the Federal Congress. U.S. Const. art. I, § 4. Furthermore, the historical record shows the overriding objective of the Framers was to establish and ensure republican principles of government, under which the people would control their rulers. The Framers, in other words, wanted to *avoid* an aristocracy, not *create* one.

The record of the Constitutional Convention clearly reveals that rather than prohibiting State enactments the Qualifications Clauses effectively removed from Congress

¹⁷ Petracca, note 3 *supra* at 31.

¹⁸ Mark P. Petracca, *A New Defense of State-Imposed Congressional Term Limits*, in 26 PS: *Political Science and Politics* 700, 702 (Dec. 1993).

¹⁹ See, e.g., Charles Warren, *The Making of the Constitution* 412-426 (1928).

the "power of regulating qualifications" for its own members.²⁰ If Congress had the authority to establish qualifications for its own members, said Madison, "it would vest an improper and dangerous power in the Legislature" (i.e. the Congress).²¹ This reason for denying to Congress the power to set qualifications for its own members or to add to those set forth in the Qualifications Clauses, is inapplicable to the States or to the people. The proscriptions included by the Framers were intended to be exclusive only as to Congress (a body of limited, delegated power), and not as to the States.²²

Comments by Thomas Jefferson support this interpretation. The Constitution, he noted, establishes "some disqualifications, to wit, those of not being twenty-five years of age, of not having been a citizen seven years, and of not being an inhabitant of the State at the time of election". It does not, however, "prohibit to the State the power of declaring . . . any other disqualifications which its particular circumstances may call for. . . . Of course, then, by the tenth amendment, the power is reserved to the State". 2 *The Founders' Constitution* 81 (Phillip Kurland & Ralph Lerner eds. 1987) (quoting *The Works of Thomas*

²⁰ Warren, note 19 *supra* at 422 (remarks of James Wilson). Charles Warren concludes that "[t]he elimination of all power in Congress to fix qualifications clearly left the provisions of the Constitution itself as the sole source of qualifications". *Id.*

²¹ *Id.* at 420. See also *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* at 427 (1987).

²² See also Warren, note 19 *supra*, at 421-422 ("the recital of these qualifications did 'by implication tie up the hands of the Legislature from supplying' any further qualifications") (emphasis added).

Jefferson at 379-81). Consistent with Jefferson's view, several States did, in fact, adopt additional restrictions shortly after ratification of the Constitution.²³

This interpretation is further bolstered by the fact the Constitutional Convention of 1787 adopted the Qualifications Clauses on August 10, 1787. Yet, on August 20, 1787, the delegates still found it necessary to adopt an express provision prohibiting States from adopting a religious test as a qualification for office.²⁴ As only ten days had elapsed since adoption of the Qualifications Clauses, it is reasonable to assume the nature and scope of the Qualifications Clauses were well in mind at that time.²⁵ If the States could not regulate the selection of their Congressional representatives beyond the three enumerated areas in the Qualifications Clauses, there would be no need for a later prohibition on religious tests.

In sum, the fact that of the Constitutional Convention did not mandate "rotation" in the Constitution is of no consequence when the Constitution is properly interpreted in light of the Tenth Amendment. The Tenth Amendment demands that limitations on state power implied from textual silence are not to be favored. When the Framers wanted to restrict State power, they knew

²³ See, e.g., Va. Act of Nov. 20, 1788, ch. 2, § II (property and district residency requirements); Ga. Act of Jan. 23, 1789, p. 247 (district residency); N.C. Act of Dec. 16, 1789, ch. 1, § I (district residency).

²⁴ Charles Warren, *The Making of the Constitution* 412-426 (1928).

²⁵ A general principle of construction is that a legislative body is presumed to have acted with knowledge of its prior enactments. See, e.g., *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

how to do so.²⁶ When State sovereignty was to be restricted it was set out in clear language.²⁷ The federal government is one of limited and delegated powers. The fact that rotation was not mandated by the Constitution in no way restricts the power of the States to enact ballot access restrictions or term limits. The proper application of the Tenth Amendment to the Qualifications Clauses strongly supports the retention of these powers by the States since the States had previously exercised them as independent sovereigns under the Articles of Confederation.²⁸ Ballot access restrictions on multi-term incumbent members of Congress are an expression of the people's retained rights and the States' will under their reserved sovereign powers.

2. The States Have a Significant Interest in Regulating Ballot Access Which is Protected by the Tenth Amendment.

The States have a significant interest in regulating ballot access in elections to choose their Congressional representatives. First of all, ballot access provisions enacted by the people of the States are an expression of voter choice and the popular will. The States have a significant interest in protecting and upholding the democratically expressed will of their citizens. This interest in exercising State power to protect the people's Ninth

²⁶ See, e.g., U.S. Const. art. I, § 10.

²⁷ See, e.g., U.S. Const. art. I, § 4; art. I, § 8.

²⁸ See, e.g., Mass. Const. of 1780, art. I, part 1; Warren note 19 *supra*, at 613.

Amendment retained rights is a key attribute of sovereignty embodied in the Tenth Amendment and guaranteed to the States by the Guarantee Clause.²⁹

Second, the States have a significant interest in ensuring representativeness in their Congressional delegations.³⁰ The Framers relied on the State governments as independent sources of authority to curb any tendency on the part of the national government – including their delegates to the national Congress – toward unresponsiveness, excessive centralization, and tyranny. *The Federalist* No. 17 at 119, (A. Hamilton), No. 46 at 298 (J. Madison) (C. Rossiter ed. 1961).

The ability of the States to fulfill their role in the constitutional framework of dual sovereignty is dependent upon their effectiveness as instruments of self-government. This requires that States maintain the confidence of their citizens, and that States have direct input in Congressional reform. It would be inconsistent with the extensive system of checks and balances embodied in the Federalist framework and the Tenth Amendment to interpret the Constitution so as to require Congress to reform itself. All constitutional amendments require *congressional* action. U.S. Const. art. V. Thus, in the area of incumbency restrictions, the remedy of a Constitutional amendment is no remedy at all since the States cannot act independently of Congress.³¹

²⁹ See § II(B), (C), *infra* at 24-33.

³⁰ See Neil Gorsuch and Michael Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State Imposed Term Limits*, 20 Hofstra L.Rev. at 377.

³¹ See generally *Baker v. Carr*, 369 U.S. 186, 193 n. 14 (1962) (noting the absence of a provision for popular initiative, in discussing the unlikelihood of legislative action to enact apportionment reform).

Finally, the States have an interest in protecting the people from overreaching by the Federal government. *Garcia*, 469 U.S. at 551.³² This interest is secure only when the States have control over the process of selecting their representatives to Congress. These State interests are protected by the Tenth Amendment and should be upheld by the Court.

3. Prior Case Law Supports State Control of Ballot Access.

The Court has upheld a variety of state laws restricting ballot access or prohibiting certain officials from seeking election to Congress. See, e.g., *Storer v. Brown*, 415 U.S. 724 (1973). See also brief of Petitioner State of Arkansas at § II. Under *Storer v. Brown*, ballot access restrictions simply do not constitute "qualifications." *Id.*³³

In *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1982), the Court stated, "[t]he State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot. . . ." The people of Arkansas, and in each State adopting ballot access restrictions, have voiced their

³² See also Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U.Pitt.L.Rev. 97, 149.

³³ See also *State ex rel. O'Sullivan v. Swanson*, 127 Neb. 806, 808-810, 247 N.W. 255-256 (1934) (holding that ballot access restriction did not constitute a qualification); Gorsuch and Guzman, note 30, *supra*, at 368 (concluding a term limit is not a qualification).

lack of support for placing multi-term incumbents on the ballot.³⁴

This brief will not attempt to duplicate the Petitioners' analysis of ballot access cases. However, the amici curiae States urge the Court to read the Qualifications Clauses together with the Elections Clause, the Ninth and Tenth Amendments, and the Guarantee Clause that grant broad authority to the people of the States to select their representatives in the Federal Congress.

4. The Exercise of Sovereignty by States Over Ballot Access Is Not Without Defined Limits.

The exercise of sovereignty by the States under the Tenth Amendment over ballot access is not without defined constitutional limits. State ballot access provisions are subject to constitutional protections such as the First and Fourteenth Amendments. *See Anderson v. Celebrezze*, 460 U.S. at 789; *Hunter v. Erickson*, 393 U.S. 385, 392 (1969).

Congress has also expressly been delegated authority to address any perceived abuses by the States in the area of time, place and manner regulations. Article I, § 4

³⁴ Further support for State control of ballot access is found in the fact that "[i]t is the State, not the federal government, that defines and restores a person's civil rights, even in regard to the federal government. The United States Constitution does not bar convicts from holding federal office. The right to vote, even in federal elections, is set by the states. The electors of both senators and representatives are determined by state law." *U.S. v. Edwards*, 745 F.Supp. 1477, 1479 (D.Minn. 1990).

provides that "Congress may at any time by law make or alter such Regulations".³⁵

II. VOTER INITIATED RESTRICTIONS THAT DENY BALLOT ACCESS TO MULTI-TERM INCUMBENTS ARE A LEGITIMATE EXERCISE OF THE RIGHTS RESERVED TO THE PEOPLE UNDER THE NINTH AND TENTH AMENDMENTS AND THE GUARANTEE CLAUSE.

Were it not for a Bill of Rights guaranteeing the viability of the States as political entities and ensuring fundamental liberties to the people, the Constitution of the United States would likely not have been ratified. *See Garcia*, 469 U.S. at 568-69 (Powell, J., dissenting). Far from being irrelevant, the Tenth Amendment "is an essential part of the Bill of Rights". *Id.* at 564-65 n.8. Likewise, the Ninth Amendment is an integral part of the Bill of Rights which protects political participation and the rights of the people.³⁶ Similarly, the Guarantee Clause ensures the right of the people to choose their own governmental officials and adopt their own laws.³⁷

All ballot access restrictions and term limits enacted by the States, including Arkansas, were citizen initiated – a factor requiring special force be given to arguments supporting their validity.³⁸ Such provisions which deny ballot access to multi-term incumbent Congressional candidates are a legitimate exercise of the rights reserved to

³⁵ *See also Hills*, note 32, *supra*, at 134-135; Merritt, note 11, *supra*, at 54.

³⁶ *See Hills*, note 32, *supra*, at 150 n.225.

³⁷ Merritt, note 8, *supra*, at 24.

³⁸ *Gregory*, 501 U.S. at 471 (noting the significance of a reform measure's approval by the people). *See also* Appendix for text of voter initiated provisions.

the people under the Ninth and Tenth Amendments and the Guarantee Clause.

A. The Tenth Amendment Reserves To The People Substantial Control Over The Selection Of Their Congressional Representatives.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are *reserved* to the States respectively, or *to the people*." U.S. Const. amend. X (emphasis added). The protection afforded to State sovereignty by the Tenth Amendment also inures to the benefit of *individuals*.

The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, *federalism secures to citizens the liberties that derive from the diffusion of sovereign power*."

New York v. U.S., 112 S.Ct. at 2431 (emphasis added) (quoting *Coleman v. Thompson*, 111 S.Ct. 2546, 2570 (1991)) (Blackmun, J., dissenting).

The protection afforded to the fundamental liberties of the people by federalism was referred to by James Madison as "a double security" which "arises to the rights of the people". *Gregory*, 501 U.S. at 459 (quoting *The Federalist No. 51* at 323 (J. Madison) (C. Rossiter ed. 1961)). It cannot seriously be disputed that one of the most fundamental liberties in a democratic republic is the control over the selection of elected representatives. The

Tenth Amendment reserves to the people substantial control over the selection of their Congressional representatives, including the right to enact ballot access restrictions on long-term incumbents. *See generally* section I, *supra*.

B. The Ninth Amendment Protects The People From Denial Or Disparagement Of Retained Rights Including The Right To Control The Selection Of Their Congressional Representatives.

This case presents a unique opportunity for the proper application of the Ninth Amendment, based on the Constitutional distinction between Ninth Amendment "rights" and Tenth Amendment "powers".

The Ninth Amendment is both complementary and supplementary to the Tenth. It provides that "[t]he enumeration in the Constitution, of certain *rights*, shall not be construed to deny or disparage others *retained* by the people". U.S. Const. amend. IX (emphasis added). The Tenth Amendment then provides that "[t]he *powers* not delegated to the United States by the Constitution, nor prohibited by it to the States, are *reserved* to the States respectively, or *to the people*". U.S. Const. amend. X (emphasis added).

"Rights" are clearly different from "powers", but not wholly unrelated to them. "Rights" are a "justifiable title or claim to something", a "legal, equitable, or moral title or claim to the possession of . . . authority", or "[t]hat which justly accrues or falls to any one, what one may properly claim; one's due". *The Oxford English Dictionary*

(2d ed. 1989). "Power" refers to the "[a]bility to do or effect something", "[a]uthority given or committed", or "[l]egal ability, capacity or authority to act, esp. delegated authority". *Id.*

The word "power" is used approximately 15 times on the face of the original Constitution as unamended and 11 times in the amendments to the Constitution.³⁹ The word "right" is not used in the unamended Constitution at all. The original draft of the Constitution as submitted to the States for ratification did not contain a Bill of Rights. That omission was its major defect according to the State ratifying conventions, which insisted on its inclusion as a condition for ratification.⁴⁰

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1. "All legislative powers" (Art. I, § 1)
 2. "the sole power of impeachment" (Art. I, § 2)
 3. "the sole power to try all impeachments" (Art. I, § 3)
 4. "The Congress shall have Power to. . . ." (Art. I, § 8)
 5. "[power to] make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution. . . ." (Art. I, § 8)
 6. "The executive power" (Art. II, § 1)
 7. "power to grant Reprieves and Pardons" (Art. II, § 2)
 8. "power . . . to make Treaties" (Art. II, § 2)
 9. "power to fill up all Vacancies that may happen. . . ." (Art. II, § 2)
 10. "The judicial Power" (Art. III, § 1)
 11. "The judicial Power shall extend. . . ." (Art. III, § 2)
 12. "Congress shall have Power to declare the Punishment of Treason" (Art. III, § 3)
 13. "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory. . . ." (Art. IV, § 3)

⁴⁰ See A.H. Fuller, *The Tenth Amendment Retires*, 41 A.B.A.J. 223 (1941).

"Rights" are spoken of at least 11 times on the face of the 26 amendments to the Constitution. Over half of those references are in the "Bill of Rights".⁴¹ The word "rights" in the Ninth Amendment must therefore be read together with its use in the other amendments, and the rights "enumerated" therein.

"Rights" must be protected, and "power" is delegated or reserved for that purpose. "Powers" are exercised at the disposal of "rights" or they are a very part of the "right" itself. Congress or the States do not have enumerated "rights," but the *people* do. Congress and the States have delegated and reserved "powers", respectively, in order to protect those "rights" possessed by the people, but not to "deny or disparage" them.

Congress has only delegated *powers*, but it has no *rights*. That is why Congress is not allowed to add qualifications for its own members. See *Powell v. McCormick*, 395 U.S. 486, 548 (1969). Congress or the State legislatures

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1. "right of the people peaceably to assemble" (amend. I)
 2. "right of the people to keep and bear arms" (amend. II)
 3. "right of the people to be secure in their persons, houses. . . ." (amend. IV)
 4. "right to a speedy and public trial" (amend. VI)
 5. "right of a trial by jury" (amend. VII)
 6. "certain rights" (amend. IX)
 7. "right to vote. . . ." (amend. XIV)
 8. "right . . . to vote" (amend. XV)
 9. "right . . . to vote" (amend. XIX)
 10. "right . . . to vote" (amend. XXIV)
 11. "right . . . to vote" (amend. XXVI)

do not choose their own members; the *people* choose them.⁴²

The people may, therefore, clearly do what the Congress may *not* do. They have the right to choose whomever they wish to represent them, as limited by the requirements of the Qualifications Clause. The Elections Clause (with its Congressional "veto") is not even implicated if a "qualification" is at issue, or if the people have simply chosen to restrict the range of their possible choices among constitutionally "qualified" candidates. It is the latter situation that occurs in the case of voter-initiated term limits or ballot access restrictions.⁴³

Ballot access restrictions or term limits enacted through voter-initiated state statutes or state constitutional amendments clearly implicate the Ninth Amendment. The Ninth Amendment is a proclamation of popular sovereignty, and that sovereignty is diluted *only* to the extent that it has been voluntarily *surrendered*. The Constitution, in the Bill of Rights, makes that point explicitly, and it permeates every other part of the Constitution as well.

⁴² While it is true the Constitution delegates not only express, but also certain implied powers, to the federal government, the implication of federal powers must be strongly disfavored where basic liberties of the people are at stake. This is the clear and express command of the Ninth Amendment. "[U]nder the U.S. Constitution, the people have [expressly] reserved only one duty for themselves: the duty of choosing Congress. In a system that takes popular sovereignty seriously, this duty ought to be broadly construed because the Ninth Amendment may require such a construction and the principles of popular sovereignty imply it." Hills, note 33, *supra*, at 150.

⁴³ See § I(D)(3), *supra* at 17 (term limits are not "qualifications").

The Constitution explicitly recognizes the right of the people to vote for their members of Congress.⁴⁴ The Ninth Amendment clearly says that a "right" enumerated in the Constitution does not negate or depreciate the existence of other rights that are not so enumerated. U.S. Const. amend. IX. If the people have the right to vote for their candidates for national office as they choose, then the people also have the right to voluntarily *restrict* their range of choice because of what they perceive to be a greater good to themselves and in their own best interest. In other words, the people, under the Ninth Amendment also possess the right to limit the incumbencies of their members of Congress, by initiating and then voting to pass term limits or ballot access restrictions in their own states. In this case the people of Arkansas have exercised their right to vote to restrict their own freedom of choice in Congressional elections. This is a right guaranteed to the people by the Ninth Amendment.⁴⁵

The State is the primary guarantor of the people's rights, and it possesses "powers" to protect those rights.⁴⁶ The State of Arkansas has a substantial interest in protecting the rights of its citizens.⁴⁷ It is precisely in this

⁴⁴ U.S. Const. art. I, § 2, amend. XVII. See also amend. XIV, XV, XIX, XXIV, and XXVI; *Oregon v. Mitchell*, 400 U.S. 112 (1970).

⁴⁵ The idea of popular sovereignty as enunciated in the Declaration of Independence and embodied in the Constitution clearly upholds such a right. See the Declaration of Independence, and its use of the word "rights".

⁴⁶ See, e.g., *U.S. v. Edwards*, 745 F.Supp. 1477, 1479 (D.Minn. 1990) ("It is the State, not the federal government, that defines and restores a person's civil rights, even in regard to the federal government").

⁴⁷ See § I(D)(2), *supra* at 15-16.

role that the Petitioner State of Arkansas asserts its Tenth Amendment sovereignty on behalf of the voters in that State, and in its own interest. The citizens of Arkansas have asserted "power" on behalf of their own "rights", and the Petitioner State of Arkansas also now comes before the Court as a defender of those rights.

The enactment of Amendment 73 and other measures like it do not usurp, nor do they interfere with, the exercise of the powers delegated to Congress in Article I. As such, Amendment 73 is simply a legitimate exercise of the people's Ninth Amendment retained rights.⁴⁸

C. The Guarantee Clause Ensures The People's Right To Select Their Own Representatives.

The Constitution "guarantee[s] to every State in this Union a Republican Form of Government". U.S. Const. art. IV, § 4. In essence, the Guarantee Clause provides a necessary "constitutional limit on federal interference with state autonomy".⁴⁹

The right of States to control selection of their representatives goes to the heart of the Guarantee Clause.⁵⁰ As

⁴⁸ Thus, the Ninth Amendment expressly prohibits reading the enumeration of election rights in Article I (as limited by the three minimum qualifications for the States' representatives in Congress) so as to otherwise deny or disparage the right of the people to control the selection of their own representatives to the Federal Legislature. The Ninth Amendment commands the application of the Tenth Amendment as a rule of construction. See section I(C), *supra* at 8.

⁴⁹ Merritt, note 8, *supra*.

⁵⁰ "[W]idespread agreement exists among scholars and jurists about the core meaning of republican government. Since at least the eighteenth century, political thinkers have stressed

the Court once stated, "[T]he distinguishing feature 'of a republican form of government' is the right of the people to choose their own officers for governmental administration, and pass their own laws". *In re Duncan*, 139 U.S. 449, 461 (1891). Thus, "[b]y guaranteeing the States a republican form of government, the language of the clause implicitly promises the States sufficient independence to maintain the responsiveness of their governments to popular will".⁵¹

The Guarantee Clause necessarily applies to both the state and federal governments. In a system of dual sovereignty where more and more power is concentrated in the federal government, see *New York v. U.S.*, 112 S.Ct. at 2418-19, the Guarantee Clause becomes illusory if the States are denied the power to control the selection of their representatives to Congress. Furthermore, the States, and their people, have an interest in ensuring that the United States itself retains a republican form of government. In *Gregory v. Ashcroft*, the Court stated that the authority of the people of the States to determine the qualifications of their most important government officials "'go[es] to the heart of representative government' ". *Gregory*, 501 U.S. at 463 (quoting *Bernal v. Fainter*, 467 U.S. 216, 221 (1984)). "It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States 'guarantee[s] to every State in this Union a Republican Form of Government.' " *Id.* (quoting U.S. Const. art. IV, § 4). In *Gregory*, the Court concluded, "[t]he people of Missouri rationally could conclude that retention elections – in which state judges run unopposed at relatively long intervals – do not serve as an adequate check

that a republican government is one in which the people control their rulers." Merritt, note 8, *supra* at 23 (emphasis added).

⁵¹ Merritt, note 8, *supra*.

on judges whose performance is deficient. Mandatory retirement is a reasonable response to this dilemma". *Id.* at 472. Similarly, the people of Arkansas have determined that the tremendous advantages of entrenched incumbency make the current election system inadequate as a check on their representatives in Congress. Restricting ballot access to multi-term incumbents serves to level the political playing field. Such provisions are a manifestation of the people's rights to control selection of their government officials which are reserved to the people and the States in the Ninth and Tenth Amendments and guaranteed by the Guarantee Clause.⁵²

In the present case, enforcement of the Guarantee Clause would reinforce State sovereignty, and the Court should not refrain from finding a justiciable question

⁵² Historical evidence supports this interpretation of the Guarantee Clause.

On November 30, 1787, for example, Jasper Yeates delivered a lengthy speech . . . to the Pennsylvania convention. . . . Yeates attempted to answer claims that the Constitution represented "a consolidation and not a confederation of the States." Yeates responded . . . by observing that the states would control both the election of Senators and Representatives and the appointment of presidential electors. He then clinched his argument by referring to the language of the Guarantee Clause. "Lest anything, indeed, should be wanting," Yeates announced,

to assure us of the intention of the framers of this constitution to preserve the individual sovereignty and independence of the States inviolate, we find it expressly declared by the 4th section of the 4th article, that "the United States shall guarantee to every State in this Union, a republican form of government". . . .

See Merritt, note 8, *supra*, at 31.

under this clause.⁵³ As one commentator has stated, "Only by leaving the citizens of each state free to establish and run their own governmental bodies can those citizens achieve Madison's republican ideal of 'a government which derives all its powers directly or indirectly from the great body of the people' ".⁵⁴

CONCLUSION

"When important ideas are forgotten by a republic, the forgetting of them is the reason why the republic lists dangerously in one direction or another. . . . The decline of public confidence in government and the resurgent interest in term limits have got the nation thinking about fundamentals. And not a moment too soon."⁵⁵ This brief by the amici curiae States is about fundamentals. It is about the fundamental concepts of federalism and role of the States in the system of dual sovereignty known as the United States of America.

⁵³ Although the Court historically has been reluctant to review many Guarantee Clause claims, *see, e.g., Colegrove v. Green*, 328 U.S. 549, 556 (1946), "neither Supreme Court precedent nor considerations of policy foreclose adjudication of claims that the federal government has violated the guarantee clause by intruding upon state autonomy". Merritt, note 8, *supra*, at 70-71. Determinations of justiciability are to be made on a case-by-case inquiry. *Baker v. Carr*, 369 U.S. 186, 211 (1962); *Reynolds v. Sims*, 377 U.S. 533, 582 (1964). The Court "has been most hospitable to challenges founded on the guarantee clause when those challenges reinforced state autonomy". Merritt, note 8, *supra*, at 73. *See, e.g., Coyle v. Smith*, 221 U.S. 559, 565 (1911).

⁵⁴ Merritt, note 8, *supra*, at 25 (quoting *The Federalist* No. 39 at 251 (J. Madison) (J. Cooke ed. 1961)).

⁵⁵ George F. Will, *Restoration: Congress, Term Limits and the Recovery of Deliberative Democracy* 5 (1992).

The ballot access restrictions enacted by the people of Arkansas are consistent with Article I of the United States Constitution and the fundamental democratic principle, "that the people should choose whom they please to govern them".⁵⁶ Regardless of whether ballot access restrictions are classified as regulations affecting the manner of an election under Art. I or as manifestations of powers reserved by the Tenth Amendment, the States and the people have a crucial interest in controlling the selection of their Congressional representatives. The people's rights would be improperly trampled if the Court were to conclude such restrictions were prohibited.

For the reasons stated, the judgment of the Arkansas Supreme Court should be reversed and Amendment 73 to the Arkansas Constitution should be reinstated.

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August 16, 1994.

⁵⁶ 2 *Debates on the Federal Constitution* 257 (J. Elliot ed. 1876) (remarks of A. Hamilton).

Nos. 93-1456 & 93-1828

—◆—
 In The
Supreme Court of the United States
 October Term, 1994
 —◆—

U.S. Term Limits, Inc., Arkansas For Governmental
 Reform, Inc., Frank Gilbert, Greg Rice,
 Lon Schultz, and Spencer Plumleg,

Petitioners,

vs.

Ray Thornton, Blanche Lambert, Dale Bumpers,
 David Pryor, et al.,

Respondents.

—◆—
 State of Arkansas ex rel. Winston Bryant,
 Attorney General of the State of Arkansas,

Petitioner,

vs.

Bobbie E. Hill, et al.,

Respondents.

—◆—
 On Writ Of Certiorari To The
 Supreme Court Of Arkansas
 —◆—

APPENDIX TO THE BRIEF OF THE STATES OF
 NEBRASKA, CALIFORNIA, COLORADO,
 CONNECTICUT, DELAWARE, FLORIDA, GEORGIA,
 HAWAII, KANSAS, KENTUCKY, MASSACHUSETTS,
 MONTANA, NEW HAMPSHIRE, OHIO, SOUTH
 DAKOTA, TENNESSEE AND WYOMING AS AMICI
 CURIAE IN SUPPORT OF THE PETITIONERS
 —◆—

APPENDIX

To date, fifteen states have enacted ballot access restrictions or term limit provisions affecting members of Congress. All fifteen were enacted through citizen initiatives. For the convenience of the Court, all the state constitutional amendments or state statutes which embody ballot access restrictions or limits on congressional terms are set forth below. A summary chart of these measures and a chart showing certified election returns on their passage are also included (see pp.14-15).

1. Arizona

Section 18. The name of any candidate for United States Senator from Arizona shall not appear on the ballot if, by the end of the current term of office, the candidate will have served (or, but for resignation, would have served) in that office for two consecutive terms, and the name of a candidate for United States Representative from Arizona shall not appear on the ballot if, by the end of the current term of office, the candidate will have served (or, but for resignation, would have served) in that office for three consecutive terms. Terms are considered consecutive unless they are at least one full term apart. Any person appointed or elected to fill a vacancy in the United States Congress who serves at least one half of a term of office shall be considered to have served a term in that office for purposes of this section. For purposes of this section, terms beginning before January 1, 1993, shall not be considered. [Added by initiative measure election Nov. 3, 1992, eff. Nov. 23, 1992].

Ariz. Const. art. VII, § 18 (West Supp. 1993).

2. Arkansas

Preamble: The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of elected officials.

§ 1. Executive Branch.

(a) The Executive Department of this State shall consist of Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, all of whom shall keep their offices at the seat of government, and hold their offices for the term of four years, and until their successors are elected and qualified.

(b) No elected officials of the Executive Department of this State may serve in the same office more than two such four year terms.

§ 2. Legislative Branch.

(a) The Arkansas House of Representatives shall consist of members to be chosen every second year by the qualified electors of the several counties. No member of the Arkansas House of Representatives may serve more than three such two year terms.

(b) The Arkansas Senate shall consist of members to be chosen every four years by the qualified electors of the several districts. No member

of the Arkansas Senate may serve more than two such four year terms.

§ 3. Congressional Delegation.

(a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas.

(b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas.

§ 4. Severability.

The provisions of this Amendment are severable, and if any should be held invalid, the remainder shall stand.

§ 5. Provisions Self-Executing.

Provisions of this Amendment shall be self-executing.

§ 6. Application.

(a) This Amendment to the Arkansas Constitution shall take effect and be in operation on January 1, 1993, and its provisions shall be applicable to all person thereafter seeking election to the offices specified in this Amendment.

(b) All laws and constitutional provisions which conflict with this Amendment are hereby

repealed to the extent that they conflict with this amendment.

Ark. Const. amend. 73 (Michie Supp. 1993) (held invalid in *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 872 S.W.2d 349 (1994), *cert. granted* by *U.S. Term Limits, Inc. v. Thornton*, 62 U.S.L.W. 3835 (1994), and *cert. granted* by *Bryant v. Hill*, 62 U.S.L.W. 3835 (1994)).

3. California

§ 25003. Limitation on ballot access.

(a) Federal legislative candidates; ballot access. Notwithstanding any other provision of law, the Secretary of State, or other election official authorized by law, shall not accept or verify the signatures on any nomination paper for any person, nor shall he or she certify or place on the list of certified candidates, nor print or cause to be printed on any ballot, ballot pamphlet, sample ballot, or ballot label the name of any person, who does either of the following:

(1) Seeks to become a candidate for a seat in the United States House of Representatives, and who, by the end of the then current term of office will have served, or but for the resignation would have served, as a member of the United States House of Representatives representing any portion or district of the State of California during six or more of the previous eleven years;

(2) Seeks to become a candidate for a seat in the United States Senate, and who, by the end of the then current term of office will have served, or but the resignation would have served, as a

member of the United States Senate representing the State of California during twelve or more of the previous seventeen years.

(b) "Write-in" candidacies. Nothing in this section shall be construed as preventing or prohibiting any qualified voter of this state from casting a ballot for any person by writing the name of that person on the ballot, or from having such a ballot counted or tabulated, nor shall any provision of this section be construed as preventing or prohibiting any person from standing or campaigning for any elective office by means of a "write-in" campaign.

(c) Construction. Nothing in this section shall be construed as preventing or prohibiting the name of any person from appearing on the ballot at any direct primary or general election unless that person is specifically prohibited from doing so by the provisions of subdivision (a), and to that end the provisions of subdivision (a) shall be strictly construed. [Added by Initiative Measure (Prop. 164, approved Nov. 3, 1992, eff. Jan. 1, 1993)].

Cal. Elec. Code § 25003 (West. Supp. 1994).

4. Colorado

§ 9a. U.S. senators and representatives-limitation on terms

(1) In order to broaden the opportunities for public service and to assure that members of the United States Congress from Colorado are representative of and responsive to Colorado citizens, no United States Senator from Colorado shall serve more than two consecutive terms in

the United States Senate, and no United States Representative from Colorado shall serve more than six consecutive terms in the United States House of Representatives. This limitation on the number of terms shall apply to terms of office beginning on or after January 1, 1991. Any person appointed or elected to fill a vacancy in the United States Congress and who serves at least one half of a term of office shall be considered to have served a term in that office for purposes of this subsection (1). Terms are considered consecutive unless they are at least four years apart.

(2) The people of Colorado hereby state their support for a nationwide limit of twelve consecutive years of service in the United States Senate or House of Representatives and instruct their public officials to use their best efforts to work for such a limit.

(3) The people of Colorado declare that the provisions of this section shall be deemed severable from the remainder of this measure and that their intention is that federal officials elected from Colorado will continue voluntarily to observe the wishes of the people as stated in this section in the event any provision thereof is held invalid. [Added Laws 1991, p. 2036, Initiated 1990, eff. Jan. 3, 1991].

(Two sections designated as section 9 of article 18 were proposed by initiative submitted to the electorate and approved at the general election of November 6, 1990, effective upon proclamation of the governor, January 3, 1991. This section appears as section 9a and the other as section 9 in the state edition.)

Colo. Const. art. XVIII, § 9a (West Supp. 1993).

5. Florida

§ 4. Disqualifications.

(a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.

(b) No person may appear on the ballot for re-election to any of the following office:

- (1) Florida representative,
- (2) Florida senator,
- (3) Florida Lieutenant governor,
- (4) Any office of the Florida cabinet,
- (5) U.S. Representative from Florida, or
- (6) U.S. Senator from Florida

if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for eight consecutive years.

Fla. Const. art. 6, § 4 (West Supp. 1994).

6. Michigan

§ 10. Limitations on terms of office of members of the United States House of Representatives and United States Senate from Michigan.

Sec. 10. No person shall be elected to office as representative in the United States House of Representatives more than three times during

any twelve year period. No person shall be elected to office as senator in the United States Senate more than two times during any twenty-four year period. Any person appointed or elected to fill a vacancy in the United States House of Representatives or the United States Senate for a period greater than one half of a term of such office, shall be considered to have been elected to serve one time in that office for purposes of this section. This limitation on the number of times a person shall be elected to office shall apply to terms of office beginning on or after January 1, 1993.

The people of Michigan hereby state their support for the aforementioned term limits for members of the United States House of Representatives and United States Senate and instruct their public officials to use their best efforts to attain such a limit nationwide.

The people of Michigan declare that the provisions of this section shall be deemed severable from the remainder of this amendment and that their intention is that federal officials elected from Michigan will continue voluntarily to observe the wishes of the people as stated in this section, in the event any provision of this section is held invalid.

This section shall be self-executing. Legislation may be enacted to facilitate operation of this section, but no law shall limit or restrict the application of this section. If any part of this section is held to be invalid or unconstitutional, the remaining parts of this section shall not be affected but will remain in full force and effect. [Enactment ratified Nov. 3, 1992, eff. Dec. 19, 1992.]

Mich. Const. art. II, § 10 (West Supp. 1994).

7. Missouri

§ 45(a). [United States Senators and Representatives-term limits]

Section 45(a). (1) No United States Senator from Missouri shall serve more than two terms in the United States Senate, and no United States Representative from Missouri shall serve more than four terms in the United States House of Representatives. This limitation on the number of terms shall apply to terms of office beginning on or after the effective date of this section. Any person appointed or elected to fill a vacancy in the United States Congress and who serves at least one-half of a term of office shall be considered to have served a term in that office for purposes of this subsection (1). The provisions of this subsection (1) shall become effective whenever at least one-half of the states enact term limits for their members of the United States Congress.

(2) The people of Missouri declare that the provisions of this section shall be deemed severable and that their intention is that federal officials elected from Missouri will continue voluntarily to observe the wishes of the people as stated in this section in the event any provision thereof is held invalid. [Adopted at general election Nov. 3, 1993.]

Mo. Const. art. III, § 45(a).

8. Montana

1) The Secretary of State or other authorized official shall not certify a candidate's nomination or election to, or print or cause to be

printed on any ballot the name of a candidate for, one of the following offices if, at the end of the current term of that office, the candidate will have served in that office or had he not resigned or been recalled would have served in that office:

- (a) 8 or more years in any 16-year period as governor, lieutenant governor, secretary of state, state auditor, attorney general, or superintendent of public instruction;
- (b) 8 or more years in any 16-year period as a state representative;
- (c) 8 or more years in any 16-year period as a state senator;
- (d) 6 or more years in any 12-year period as a member of the U.S. House of Representatives; and
- (e) 12 or more years in any 24-year period as a member of the U.S. Senate.

2) When computing time served for purposes of subsection (1), the provisions of subsection (1) do not apply to time served in terms that end during or prior to January 1993.

3) Nothing contained herein shall preclude an otherwise qualified candidate from being certified as nominated or elected by virtue of write-in votes cast for said candidate.

Mont. Const. art. IV, § 8.

9. Nebraska

Sec. 20. Representatives in Congress; United States Senator; filing ineligibility. Any person

who shall have been elected to serve four consecutive terms in the office of Representative in Congress shall not be listed on any official ballot at any primary or general election to seek a fifth consecutive term; and any person who shall have been elected to serve two consecutive terms in the office of United States Senator shall not be listed on any official ballot at any primary or general election to seek a third consecutive term and neither may be listed on an official ballot as a candidate for a period of years equal to the number of years in the term for which that person was last elected as Representative in Congress or as a United States Senator. The term held and being served as the result of an election prior to the effective date of this amendment shall not be included in the number of consecutive terms referred to in stipulating ineligibility to file for election or to be listed on an election ballot. [Adopted 1992].

Neb. Const. art. XV, § 20 (Supp. 1993) (invalidated on state grounds for lack of sufficient signatures on petitions, *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994)).

10. North Dakota

16.1-01-13. Term limits for United States senators and representatives in Congress. A person is permanently ineligible to have that person's name placed on the ballot at any election for the office of United States senator or representative in Congress if, by the state of the term for which the election is being held, the person will have

served as a United States senator or a representative in Congress, or in any combination of those offices, for a least twelve years.

Source: I.M. approved November 3, 1992.

Note: This section was created by an initiated measure approved by the people at the general election on November 3, 1992.

16.1-01-13.1. Term limits for United States senators and representatives in Congress. A person is ineligible to have that person's name placed on the ballot at any election for the office of United States senator or representative in Congress if, by the start of the term for which the election is being held, that person will have served as a United States senator or a representative in Congress, or in any combination of those offices, for at least twelve years. However, if that person is still otherwise eligible to hold the office, the disqualification imposed by this section ceases after two years have elapsed since the disqualification last affected that person's eligibility for placement on the ballot.

Source: I.M. approved November 3, 1992.

16.1-01-14. Statement of intent. In enacting this measure, the people of North Dakota:

1. Recognize that, along with the rest of the people of the United States, we have bestowed certain powers on the state and federal governments, and the governmental power flows ultimately from the people, not to them.

2. Do so in the partial exercise of our duty to elect representatives in Congress, under Article I, section 2 of the United States Constitution, and our duty to elect United States Senators,

under the 17th Amendment to the United States Constitution.

3. Recognize that the United States Supreme Court has never held that the people of a state do not have the constitutional power to establish term limits for federal legislators from their state.

4. Recognize that certain restrictions are placed on our ability to choose federal legislators, such that we could not, for example, elect a 28-year-old to the Senate to require a religious test for a federal legislator.

5. Assert that, aside from the requirements explicitly imposed by the United States Constitution, our power with respect to election of federal legislators is plenary.

6. Note that, under the United States Constitution, we have certain rights to control suffrage in elections, regulating such matters as residency, ballot access, and voting methods. As the possessors of the power to regulate suffrage, we also have the power to regulate certain qualifications of the agents we appoint by exercising our suffrage.

7. Exercise the legislative power we reserved to ourselves in Article III, Section 1 of the North Dakota Constitution.

8. Recognize that, just as the federal Hatch Act [5 U.S.C. § 7324 et seq.] restricts the candidacies of otherwise eligible persons from holding elected office, we have the same salutary purpose as does the Hatch Act, namely preventing an incumbent party from using government power to entrench itself permanently into government office.

9. Are mindful of the United States Supreme Court's statement, in *Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528, 551 (1985), that state control of the election process is supposed to be a protection of the state peoples from the national government.

10. Recognize that increased concentration of power in the hands of incumbents has made this state's electoral system less free, less competitive, and most importantly, less representative.

11. Recognize that our interests are best served by having our United States senators and representatives in Congress be mindful of their origins and return to our ranks whence they came.

12. Make the following declarations and historical findings:

a. James Madison, in No. 57 of *The Federalist Papers*, predicted that the House of Representatives would always be responsive to the will of the people because that house would be bound by the same laws they impose on the people. His prediction was wrong and Congress has arrogated to itself powers not granted to the people, a recent notorious example being the bank of the House of Representatives in which members were allowed to kite checks. His prediction was wrong in that Congress has oppressed the people with laws from which it exempts itself, recent examples including minimum wage, discrimination, occupational safety, and other laws.

b. The appearance of corruption and the lack of competitiveness for entrenched

incumbency seats has lessened voter participation and that is counter-productive to the purposes of a representative republic.

c. Our vital interests in maintaining the integrity of the political process have been harmed by these and other factors. Therefore, term limitation is the best method by which we can insure that our vital interests are guarded.

13. Believe this measure is constitutional and intend it to be so. Therefore, even if a court holds any portion of this measure unconstitutional, thereby substituting its own judgment for that we have expressed in enacting this measure, the Legislative Council shall require the publisher of the North Dakota Century Code to include the text of this measure, in the manner as if not so held but with appropriate annotation, to stand as a testament to our expressed will, and as a memorial to the defiance of that will by whatever court holds this measure unconstitutional. Furthermore, if any part of this measure is held unconstitutional, we intend that the rest of it be deemed effective, to the maximum extent permitted under section 1-02-20.

Source: I.M. approved November 3, 1992.

Note: This section was created by an initiated measure approved by the people at the general election on November 3, 1992.

N.D. Cent. Code § 16.1-01-13, § 16.1-01-13.1, § 16.1-01-14 (Michie Supp. 1993).

11. Ohio**§ 8 Term limitations.**

No person shall hold the office of United States Senator from Ohio for a period longer than two successive terms of six years. No person shall hold the office of United States Representative from Ohio for a period longer than four successive terms of two years. Terms shall be considered successive unless separated by a period of four or more years. Only terms beginning on or after January 1, 1993, shall be considered in determining an individual's eligibility to hold office. [Adopted November 3, 1992.]

Ohio Const. art. V, § 8 (Supp. 1993).

12. Oregon

Section 20. Limits on Congressional Terms. To promote varied representation, to broaden the opportunities for public service, and to make the electoral process fairer by reducing the power of incumbency, terms in the United States Congress representing Oregon are limited as follows:

(1) No person shall represent Oregon for more than six years in the U.S. House of Representatives and twelve years in the U.S. Senate in his or her lifetime.

(2) Only terms of service beginning after this Act [sections 19 to 21 of this Article] goes into effect [December 3, 1992] shall count towards the limits of this Section.

(3) When a person is appointed or elected to fill a vacancy in office, then such service shall

be counted as one term for the purposes of this Section.

(4) A person shall not appear on the ballot as a candidate for elected office or be appointed to fill a vacancy in office if serving a full term in such office would cause them to violate the limits in this section. [Created through initiative petition filed April 23, 1991, and adopted by the people Nov. 3, 1992.]

Note: The lead line to section 20 was a part of the measure proposed by initiative petition filed April 23, 1991, and adopted by the people Nov. 3, 1992.

Ore. Const. art. II, § 20 (1993).

13. South Dakota

§ 32. Term limitations for United States congressman.

Commencing with the 1992 election, no person may be elected to more than two consecutive terms in the United States senate or more than six consecutive terms in the United States house of representatives.

S.D. Const. art. III, § 32 (Michie Supp. 1994).

14. Washington

29.68.015. United States house of representatives-Term limits.

No person is eligible to appear on the ballot or file a declaration of candidacy for the United States house of representatives who, by the end of the then current term of office will have

served, or but for resignation would have served, as a member of the United States house of representatives during six of the previous twelve years. [Enacted by Laws 1993, ch. 1, § 4 (Initiative Measure No. 573, approved Nov. 3, 1992)].

29.68.016. United States senate-Term limits.

No person is eligible to appear on the ballot or file a declaration of candidacy for the United States senate who, by the end of the then current term of office will have served, or but for resignation would have served, as a member of the United States senate during twelve of the previous eighteen years. [Enacted by Laws 1993, ch. 1, § 5 (Initiative Measure No. 573, approved Nov. 3, 1992)].

Wash. Rev. Code §§ 29.68.015-016 (West Supp. 1994) (held invalid in *Thorstead v. Gregoire*, 841 F.Supp. 1068 (W.D. Wash. 1994) [now on appeal]).

15. Wyoming

(a) Notwithstanding any other provision of Wyoming law, the Secretary of State or other authorized official shall not accept nomination applications or certify as a nominee or candidate for the office sought, the name of any person, if the following will occur:

(i) The person by the end of the current term of office will have served, or but for resignation, would have served as a representative from Wyoming for twelve (12) or more years in any twenty-four (24) year period to the United States Senate, except that any time served to the United States Senate prior to January 1, 1993,

shall not be counted for purposes of this term limit.

(ii) The person by the end of the current term of office will have served, or but for resignation, would have served as a representative from Wyoming to the United States House of Representatives for six (6) or more years in any twelve (12) year period of time, except that any time served in the United States House of Representatives, prior to January 1, 1993, shall not be counted for purposes of this term limit.

Wyo. Stat. § 22-5-104 (Michie Supp. 1993).

STATES WHICH HAVE ENACTED BALLOT ACCESS RESTRICTIONS
OR TERM LIMITS FOR MEMBERS OF CONGRESS

State	Ballot Measure	U.S. House	U.S. Senate
Arizona	Proposition 107	3 terms/6 years	2 terms/12 years
Arkansas	Amendment 4	3 terms/6 years	2 terms/12 years
California	Proposition 164	3 terms/6 years	2 terms/12 years
Colorado	Amendment 5	6 terms/12 years	2 terms/12 years
Florida	Amendment 9	4 terms/8 years	2 terms/12 years
Michigan	Proposition B	3 terms/6 years	2 terms/12 years
Missouri	Amendment 13	4 terms/8 years	2 terms/12 years
Montana	Constitutional Initiative 64	3 terms/6 years	2 terms/12 years
Nebraska	Measure 407	4 terms/8 years	2 terms/12 years
North Dakota	Measure 5	6 terms/12 years	2 terms/12 years
Ohio	Issue 2	4 term/8 years	2 terms/12 years
Oregon	Measure 3	3 term/6 years	2 terms/12 years
South Dakota	Constitutional Amendment A	6 terms/12 years	2 terms/12 years
Washington	Initiative 573	3 terms/6 years	2 terms/12 years
Wyoming	Initiative 2	3 terms/6 years	2 terms/12 years

Source: Term Limits Legal Institute, Washington D.C.

**CERTIFIED ELECTION RETURNS FOR BALLOT MEASURES TO ENACT BALLOT
ACCESS RESTRICTIONS OR TO LIMIT TERMS OF MEMBERS OF CONGRESS**

State	U.S. House	U.S. Senate	Vote Yes (%)	Vote No (%)
Arizona Proposition 107	3 terms/6 years	2 terms/12 years	1,026,830 (75%)	356,799 (25%)
Arkansas (Amendment 4)	3 terms/6 years	2 terms/12 years	494,326 (60%)	330,836 (40%)
California Proposition 164	3 terms/6 years	2 terms/12 years	6,578,636 (64%)	3,769,510 (36%)
Colorado* (Amendment 5)	6 terms/12 years	2 terms/12 years	708,974 (71%)	289,664 (29%)
Florida (Amendment 9)	4 terms/8 years	2 terms/12 years	3,625,500 (77%)	1,097,127 (23%)
Michigan Proposition B	3 terms/6 years	2 terms/12 years	2,323,171 (59%)	1,629,368 (41%)
Missouri (Amendment 13)	4 terms/8 years	2 terms/12 years	1,590,552 (74%)	558,299 (26%)
Montana (Constitutional Initiative 64)	3 terms/6 years	2 terms/12 years	264,174 (67%)	130,695 (33%)
Nebraska (Measure 407)	4 terms/8 years	2 terms/12 years	481,048 (68%)	224,114 (32%)
North Dakota Measure 5	6 terms/12 years	2 terms/12 years	162,150 (56%)	129,930 (44%)
Ohio (Issue 2)	4 term/8 years	2 terms/12 years	2,897,123 (66%)	1,476,009 (34%)
Oregon (Measure 3)	3 term/6 years	2 terms/12 years	1,003,706 (70%)	439,694 (30%)
South Dakota Constitutional Amendment A	6 terms/12 years	2 terms/12 years	205,074 (64%)	117,702 (36%)
Washington Initiative 573	3 terms/6 years	2 terms/12 years	1,119,985 (52%)	1,018,260 (48%)
Wyoming (Initiative 2)	3 terms/6 years	2 terms/12 years	150,113 (77%)	44,424 (23%)

TOTAL: 22,631,362 (66%) 11,612,431 (34%)

*Colorado passed term limits in November of 1990. All other term limits measures were approved in November of 1992. Sources: Term Limits Legal Institute, Washington D.C.; Offices of Secretaries of State, Election Divisions.

13 10
Nos. 93-1456 and 93-1828

FILED
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CLERK OF THE CLERK

IN THE
Supreme Court of the United States
October Term, 1994

U.S. TERM LIMITS, INC., *et al.*,

Petitioners,

v.

RAY THORNTON, *et al.*,

Respondents.

STATE OF ARKANSAS *ex rel.* WINSTON BRYANT,
Attorney General of the State of Arkansas,

Petitioner,

v.

BOBBIE E. HILL, *et al.*,

Respondents.

On Writ of Certiorari to the
Supreme Court of Arkansas

**BRIEF OF THE WASHINGTON LEGAL FOUNDATION;
UNITED STATES SENATOR KAY BAILEY HUTCHISON;
UNITED STATES REPRESENTATIVES ROBERT K.
DORNAN, DANA ROHRABACHER, TILLIE FOWLER,
GERALD B.H. SOLOMON, PETER I. BLUTE, BOB
FRANKS, MARTIN R. HOKE, BILL BAKER, SCOTT
McINNIS, DAN MILLER, BILL McCOLLUM, BOB
INGLIS, JIM RAMSTAD, SCOTT KLUG, JAY KIM, AND
NICK SMITH; NEW YORKERS FOR TERM LIMITS; AND
THE ALLIED EDUCATIONAL FOUNDATION AS AMICI
CURIAE IN SUPPORT OF THE PETITIONERS**

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August 16, 1994

TABLE OF CONTENTS

	Page
INTEREST OF THE <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	4
ARGUMENT	4
I. AMENDMENT 73 IS AN EXERCISE OF THE EXPRESS POWER GRANTED TO THE STATES BY THE CONSTITUTION TO PRESCRIBE THE TIMES, PLACES, AND MANNER OF HOLDING ELECTIONS FOR SENATORS AND REPRESENTATIVES	6
II. THE TENTH AMENDMENT CONFIRMS THE SPECIAL REGARD OF ARTICLE I, SECTION 4 FOR STATE REGULATION OF ELECTIONS FOR SENATORS AND REPRESENTATIVES	7
A. The Tenth Amendment Permits The States To Add Qualifications For Members Of The House And The Senate Because The Constitution Does Not Prohibit The States From Exercising That Power	8
B. The Tenth Amendment And The Express Power Of The States To Regulate The "Manner" Of Holding Elections Support The Constitutionality Of Amendment 73	17
CONCLUSION	20

TABLE OF AUTHORITIES

	Page
CASES	
<i>Garcia v. San Antonio Metro. Transit Auth.</i> , 469 U.S. 528 (1985)	8, 18, 19
<i>Gregory v. Ashcroft</i> , 111 S. Ct. 2395 (1991)	8, 18
<i>Legislature of California v. Eu</i> , 816 P.2d 1309 (Cal. 1991), <i>cert. denied</i> , 112 S.Ct. 1292 (1992)	2
<i>Lowe v. Kansas City Board of Election Commissioners</i> , 752 F. Supp. 897 (W.D. Mo. 1990)	2
<i>New York v. United States</i> , 112 S. Ct. 2408 (1992) . . .	8
<i>National League of Cities v. Usery</i> , 426 U.S. 833 (1976)	8
<i>Roudebush v. Hartke</i> , 405 U.S. 15 (1972)	6, 18, 19
<i>Smiley v. Holm</i> , 285 U.S. 355 (1932)	6
<i>South Carolina v. Baker</i> , 485 U.S. 505 (1988)	19
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	7
<i>Tashjian v. Republican Party of Conn.</i> , 479 U.S. 208 (1986)	6

TABLE OF AUTHORITIES (Cont'd.)

	Page
<i>Thorsted v. Gregoire</i> , 841 F.Supp. 1068 (W.D. Wash. 1994), <i>appeal pending</i> <i>sub nom. Thorsted v. Munro</i> No. 94-35222, <i>etc.</i> (9th Cir. 1994)	3
<i>U.S. Term Limits, Inc. v. Hill</i> , 316 Ark. 251, 872 S.W.2d 349 (1994)	2, 5, 16
CONSTITUTIONAL PROVISIONS AND STATUTES	
U.S. Const. art. I, § 2, cl. 1	15
U.S. Const. art. I, § 2, cl. 2	<i>passim</i>
U.S. Const. art. I, § 2, cl. 3	16
U.S. Const. art. I, § 3, cl. 1	16
U.S. Const. art. I, § 3, cl. 3	<i>passim</i>
U.S. Const. art. I, § 4, cl. 1	<i>passim</i>
U.S. Const. art. I, § 5, cl. 1	19
U.S. Const. amend. X	<i>passim</i>
2 U.S.C. § 2c (1988)	18
Ark. Const. amend. 73	<i>passim</i>

TABLE OF AUTHORITIES (Cont'd.)

	Page
MISCELLANEOUS	
Articles of Confederation, art. V	13, 14
<i>The Federalist No. 53</i> (James Madison) (Jacob E. Cooke ed., 1961)	9, 13
<i>The Federalist No. 57</i> (James Madison) (Jacob E. Cooke ed., 1961)	9, 13
<i>The Federalist No. 59</i> (Alexander Hamilton) (Jacob E. Cooke ed., 1961)	6
<i>The Federalist No. 60</i> (Alexander Hamilton) (Jacob E. Cooke ed., 1961)	9
Letter from Thomas Jefferson to Joseph C. Cabell (Jan. 31, 1814) in 11 <i>The Works of Thomas Jefferson</i> 379-81 (Paul Leicester Ford ed. Fed. ed. 1904), reprinted in 2 Philip B. Kurland & Ralph Lerner, <i>The Founders' Constitution</i> 81 (1987) . . .	12, 17
Madison's Report of the House Debate on May 22, 1789, in 12 <i>The Papers of James Madison</i> 179-82 (William T. Hutchinson, et al. eds. 1979), reprinted in 2 Philip B. Kurland & Ralph Lerner, <i>The Founders' Constitution</i> 75-76 (1987)	14

TABLE OF AUTHORITIES (Cont'd.)

	Page
<i>Notes on the Debates in the Federal Convention of 1787 by James Madison</i> 427 (Ohio Univ. Press 3d rev. ed. 1987)	9, 10, 12, 13, 17
2 Joseph Story, <i>Commentaries on the Constitution</i> §§ 623-628 (1833), reprinted in 2 Philip B. Kurland & Ralph Lerner, <i>The Founders' Constitution</i> 84-85 (1987)	13, 14, 15
James Wilson, Speech of October 6, 1787 reprinted in 1 <i>The Debates on the Constitution</i> 63 (Bernard Baylin ed. 1993)	12
Stephen J. Safranek, <i>Term Limitations: Do the Winds of Change Blow Unconstitutional?</i> , 26 Creighton L. Rev. 321 (1993)	6, 7

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1456

U.S. TERM LIMITS, INC., *et al.*,
Petitioners,

v.

RAY THORNTON, *et al.*,
Respondents.

No. 93-1828

STATE OF ARKANSAS *ex rel.* WINSTON BRYANT,
Attorney General of the State of Arkansas,
Petitioner,

v.

BOBBIE E. HILL, *et al.*,
Respondents.

**On Writ of Certiorari to
the Supreme Court of Arkansas**

**BRIEF OF THE WASHINGTON LEGAL
FOUNDATION, *ET AL.*, AS *AMICI CURIAE* IN
SUPPORT OF THE PETITIONERS**

INTEREST OF THE *AMICI CURIAE**

Amici curiae file this brief in support of petitioners in
No. 93-1828 and No. 93-1456. Both of these cases review

* Consent to the filing of this brief from counsel for the parties has been
filed with the Clerk of this Court.

the same judgment of the Supreme Court of Arkansas: *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 872 S.W.2d 349 (1994). *Amici curiae* consist of the Washington Legal Foundation ("WLF"); United States Senator Kay Bailey Hutchison; United States Representatives Robert K. Dornan, Dana Rohrabacher, Tillie K. Fowler, Gerald B.H. Solomon, Peter I. Blute, Bob Franks, Martin R. Hoke, Bill Baker, Scott McInnis, Dan Miller, Bill McCollum, Bob Inglis, Jim Ramstad, Scott Klug, Jay Kim, and Nick Smith; New Yorkers for Term Limits; and the Allied Educational Foundation. All *amici* have an interest in the outcome of the case *sub judice* in that it involves what have been called "term limits" on federal legislative offices.

WLF is a national nonprofit public interest law and policy center based in Washington, D.C., with over 100,000 members and supporters nationwide, including many voters residing in the State of Arkansas. WLF devotes substantial resources to litigating cases that raise issues of federalism and that affect the rights of voters and taxpayers. Along with some of the congressional *amici*, WLF has filed *amicus* briefs in support of term limits in *Legislature of California v. Eu*, 816 P.2d 1309 (Cal. 1991), *cert. denied*, 112 S. Ct. 1292 (1992), in *Lowe v. Kansas City Board of Election Commissioners*, 752 F. Supp. 897 (W.D. Mo. 1990), and in support of the petition for certiorari in *Arkansas ex rel. Bryant v. Hill*, No. 93-1828, one of the consolidated cases now before this Court.

United States Senator Kay Bailey Hutchison and United States Representatives Robert K. Dornan, *et al.*, are supporters of term limits in general and of Amendment 73 to the Arkansas Constitution in particular. They believe that term limits are constitutional, and, as Members of Congress, they have a particular interest in

whether term limits become effective. New Yorkers for Term Limits is a nonprofit organization dedicated to enacting term limits at the local level. The Allied Educational Foundation is a non-profit educational organization founded in 1964 and based in Englewood, New Jersey. It devotes substantial resources to promoting liberty and political freedom, and it has appeared with WLF as *amicus curiae* in numerous cases, including term limits cases.

In addition, *amici curiae* have a collective interest in this case that arises from their participation in *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994), which is now on appeal to the United States Court of Appeals for the Ninth Circuit as *Thorsted v. Munro*, No. 94-35222, *etc.* Like the case *sub judice*, the *Thorsted* litigation raises the issue whether a State can, consistent with the United States Constitution, restrict the ability of multi-term incumbents to have their names placed on the ballot for re-election to the United States Senate or the United States House of Representatives. WLF, *et al.*, filed briefs *amici curiae* with both the district court and the court of appeals in that litigation, arguing that the State of Washington's attempt to restrict access to the ballot for federal legislative office comported with the system of dual sovereignty between the States and the federal government established by Article I of the Constitution and confirmed by the Tenth Amendment.

The Washington Legal Foundation, *et al.*, are filing this brief *amici curiae* to encourage the Court to reverse the decision of the Arkansas Supreme Court because (among other things) the judgment below does violence to that system of dual sovereignty.

SUMMARY OF ARGUMENT

Arkansas Amendment No. 73 is a permissible exercise of State authority to regulate the time, place and manner of election of federal Representatives and Senators. Because Amendment No. 73 does not preclude the re-election of long-term incumbents to additional terms in Congress, it does not constitute an additional qualification for election to Congress. The citizens of Arkansas, through their initiative procedure, properly exercised their inherent power to regulate the election of representatives from their State to the federal legislature consistent with the Tenth Amendment.

ARGUMENT

This case presents important questions of popular sovereignty and the power of the States to give effect to unequivocal expressions of popular will. Beginning in 1990, the people of fifteen States either have established ballot access restrictions for multi-term incumbents of federal legislative office or have more directly limited the number of terms that an individual may serve as a United States Representative or Senator. Indeed, such provisions have been adopted overwhelmingly in every State in which they have appeared as a ballot initiative. The provisions adopted to date will apply to 153 Representatives (over 35% of the total) and to 28 Senators. *See generally* Br. of State Petitioner at 24-25 & n.34. It is fair to say that "[t]he term limits movement, embracing both printed ballot restrictions and term limitations, is the most significant grassroots political phenomenon of recent years," Pet. No. 93-1456 at 8, and that the case *sub judice* accordingly "involves some of the most important election law issues ever to come before this Court." Pet. No. 93-1828 at 13.

The ballot access restrictions at issue in this case, section 3 of Amendment 73 to the Arkansas Constitution, provide that after a person has been elected to three or more terms (six years) as a member of the United States House of Representatives, or to two or more terms (twelve years) as a member of the United States Senate, he or she "shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to [those respective offices]." Pet. App. 69a.¹ As interpreted by the Supreme Court of Arkansas, Amendment 73 allows incumbents to run as write-in candidates and to serve if elected by the voters. *Id.* at 15a. The people of Arkansas adopted Amendment 73 pursuant to the initiative petition procedures in the Arkansas Constitution; Amendment 73 was approved by a vote of 494,326 to 330,836 during the November 3, 1992 general election.

Amici endorse the arguments of petitioners in these cases. *Amici* submit this brief to offer the following additional reasons why the Court should reverse the decision below. That decision rejected the argument that Arkansas Amendment 73 is "a regulatory measure falling within the State's ambit under [Article I, Section 4, Clause 1 of the Constitution]," Pet. App. 14a, and concluded that the power to impose ballot access restrictions on multi-term federal legislative incumbents "is not a power left to the states under the Tenth Amendment." *id.* at 15a. These holdings are contrary to the Court's decisions concerning the balance of power between the States and the federal government.

¹ "Pet. App." refers to the petition appendix in No. 93-1456.

I. AMENDMENT 73 IS AN EXERCISE OF THE EXPRESS POWER GRANTED TO THE STATES BY THE CONSTITUTION TO PRESCRIBE THE TIMES, PLACES, AND MANNER OF HOLDING ELECTIONS FOR SENATORS AND REPRESENTATIVES.

The decision below failed to apply properly the principle that "the Constitution grants to the States a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives.'" *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (quoting U.S. Const. art. I, § 4, cl. 1). This Court has repeatedly "recognized the breadth of those powers: 'It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections . . .'" *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

That the States have primary responsibility for the regulation of federal legislative elections has been recognized since the Founding. Defending Article I, Section 4 of the proposed Constitution against criticism that it would give too much power to Congress, Alexander Hamilton emphasized the primacy of the States in the "ordinary" cases: the Convention of 1787 "submitted the regulation of elections for the Federal Government in the first instance to the local administrations." *The Federalist No. 59*, at 399 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Furthermore, the debate in the State ratifying conventions about Article I, Section 4 was framed by the understanding that whatever entity had power to regulate the time, place, and manner of federal legislative elections had very broad power indeed. See Stephen J. Safranek, *Term Limitations: Do the Winds of Change Blow*

Unconstitutional?, 26 Creighton L. Rev. 321, 329-40 (1993). In summarizing the result of nearly two centuries of practice pursuant to the Constitution's mode of disposing power over congressional elections, this Court cited Article I, Section 4 and observed approvingly that "the States have evolved comprehensive . . . election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

Under *Storer* and other decisions of this Court, the ballot access restrictions imposed by Amendment 73 are a proper exercise of Arkansas' power to prescribe the times, places, and manner of holding federal legislative elections. The petitioners have developed this argument sufficiently, see Br. of State Petitioner at 9-36, and *amici* will not labor the point. There is, however, an additional and related argument that, except for a brief reference, see Pet. No. 93-1456 at 15, was not addressed by the petitioners in their petitions for certiorari. That argument sounds in the Constitution's general reservation of powers to the States in the Tenth Amendment.

II. THE TENTH AMENDMENT CONFIRMS THE SPECIAL REGARD OF ARTICLE I, SECTION 4 FOR STATE REGULATION OF ELECTIONS FOR SENATORS AND REPRESENTATIVES.

The Tenth Amendment explicitly enshrines the fundamental principle that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. This Court has recently reaffirmed this point, stating that "our

Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991). Given its recognition of "the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government," *Gregory*, 111 S. Ct. at 2399, the Court must often take up "the task of ascertaining the constitutional line between federal and state power" drawn by the Tenth Amendment. *New York v. United States*, 112 S. Ct. 2408, 2417 (1992). This task is difficult and therefore tends to doctrinal confusion. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (5-4 decision) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976) (5-4 decision)). Nevertheless, the task must be faithfully performed to give effect to the bedrock principle of "dual sovereignty" inherent in our Constitution.

A. The Tenth Amendment Permits The States To Add Qualifications For Members Of The House And The Senate Because The Constitution Does Not Prohibit The States From Exercising That Power.

The interpretive principle embodied in the Tenth Amendment is that powers not specifically delegated to the federal government nor prohibited to the States may be exercised by the States. Respondents contend that the inclusion in the Constitution of provisions setting forth qualifications for members of the House and the Senate, U.S. Const. art. I, § 2, cl. 2 & art. I, § 3, cl. 3, prohibited both the national legislature and the States from imposing any other qualifications. Respondents' argument rests on statements made by James Madison in the debates at the Convention and in *The Federalist*. At the Constitutional

Convention Madison advanced the view that the qualifications of the representatives to the national legislature should be fixed by the Constitution and be unalterable by the national legislature.² *Notes on the Debates in the Federal Convention of 1787* by James Madison 427 (Ohio Univ. Press 3d rev. ed. 1987)(hereinafter "*Notes*") (opposing a draft Article VI, § 2, which would give the national legislature a power to add a property qualification).³ Although Madison's statements certainly reveal a great deal about Madison's own thinking on this issue, they do not reflect the views of all of the Framers expressed during the Convention.

² *The Federalist* No. 53 (James Madison) and *The Federalist* No. 57 (James Madison), consistent with Madison's position during the August 10 debate, indicate that the Constitution alone determines the qualifications. In *The Federalist* No. 60, Alexander Hamilton restated the position, relying on the discussion of this point in Madison's earlier articles.

³ At the August 10, 1789 debate the Framers discussed proposed Article VI, § 2 of the August 6, 1789 draft by the Committee of Detail. *Notes* at 387. The August 10 debate focused on proposed Article VI, § 2, which would give Congress the power to add a property qualification if it so chose. This debate began with Pickney's motion (joined by Rutledge) to require a property qualification, instead of leaving the question of whether to have a property qualification to the discretion of Congress as provided in proposed Article VI, § 2. The Pickney-Rutledge proposal was defeated. *Notes* at 425-27. Madison then made his statement objecting to idea of allowing the national legislature to alter the qualifications. *Id.* at 427. Gouverneur Morris moved to change the proposed section so that the national legislature would have power to add any type of qualification. *Id.* at 427-28. Morris's proposal was also defeated. *Id.* at 428. James Wilson then recommended deleting the original proposed Article VI, § 2. The Convention deleted the section.

Shortly after Madison's remarks, Judge James Wilson opposed the same draft section that Madison opposed. Yet Wilson clearly premised his opposition to the proposed section on his view that there would exist a power to add qualifications. Madison's *Notes* report Wilson's position as follows:

[I]t would be best on the whole to let [proposed Article VI, § 2] go out. A uniform rule [of property qualification] would probably be never fixed by the [national] Legislature, and this particular power [in proposed Article VI, § 2] *would constructively exclude every other power of regulating qualifications.*

Notes at 428 (emphasis added). Immediately after Wilson's speech, the Convention voted to delete proposed Article VI, § 2. Under Judge Wilson's interpretative view, keeping Article VI, § 2 would suggest that the only addition that could be made to the qualifications would be a property qualification adopted by Congress. Wilson had participated in the previous two days of debate, and certainly knew of proposed Article IV, § 2 (qualifications for House Members) and proposed Article V, § 3 (qualifications for Senators). *See Notes* at 386-87 (August 6 draft by the Committee of Detail).⁴ Had Wilson understood those clauses to preclude any addition of qualifications, Wilson's remarks on August 10 would have made no sense. Wilson's apparent reading of those

⁴ The August 6 Draft also contained the precursor "time, place and manner" clause as proposed Art. VI, § 1. *Notes* at 387. The proposed "time, place and manner" clause, which confirmed the State power to regulate elections to the national legislature, appeared in the August 6 Draft immediately before the proposed "property qualifications" power. *Id.*

provisions—as well as his views as to whether it is desirable that additional qualifications could be imposed—were thus diametrically opposed to those of Madison, and Madison's interpretation may not be taken as the controlling view of the Convention on the issue of whether qualifications could be added.

While Judge Wilson did not clearly indicate during the debate who would exercise the power to add qualifications, Wilson's reference to "every other power" suggests that more than one body could exercise the power to add qualifications. This reading of Wilson's statement is consistent with his subsequent statements embracing the interpretative principle later enshrined in the Tenth Amendment:

When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve; and therefore upon every question reflecting the jurisdiction of the house of assembly, if the frame of [State] government is silent, the jurisdiction is efficient and complete. But in delegating federal powers, another criterion was necessarily introduced, and the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of the union. Hence it is evident, that in the former case every thing which is not reserved is given, but in the latter the reverse of the proposition prevails, and every thing which is not given, is reserved.

James Wilson, Speech of October 6, 1787 *reprinted in* 1 *The Debates on the Constitution* 63, 63-64 (Bernard Baylin ed. 1993). Based on his statement of interpretative

principles, it is reasonable to assume that Wilson expected the States to have the power to add qualifications.

Early in our constitutional era, Thomas Jefferson relied on the Tenth Amendment in advancing his interpretation that the each State could impose additional qualifications on its own representatives to the national government.⁵ Letter from Thomas Jefferson to Joseph C. Cabell (Jan. 31, 1814) in 11 *The Works of Thomas Jefferson* 379-81 (Paul Leicester Ford ed. Fed. Ed. 1904), reprinted in 2 Philip B. Kurland & Ralph Lerner *The Founders' Constitution* 81 (1987).

Had the constitution been silent, nobody can doubt but that the right to prescribe all the qualifications and disqualifications of those they would send to represent them, would have belonged to the State. So also the constitution might have prescribed the whole and excluded all the others. It seems to have preferred the middle way. It exercised its power in part, by declaring some disqualifications But it does not declare, itself, that the member shall not be a lunatic, a pauper, a convict of treason, of murder, of felony, or of infamous crime, or a non-resident of his district; nor does it prohibit to the State the power of declaring these, or any other disqualifications which [the State's] particular circumstances may call for; and these may be different in different States. Of course, then, by the tenth amendment, the power is reserved to the State.

⁵ Jefferson apparently reached his conclusion without knowledge of Wilson's statement during the August 10 debate; the *Notes* were first published in 1840.

Id. Jefferson's reading of the Constitution thus gives strongest emphasis to the distinction in the Constitution between the delegated federal power and the broader State power. The basic interpretive presumption should be that States have power to regulate unless the Constitution clearly mandates otherwise.

Writing some twenty years later, Justice Joseph Story stated the opposing position.⁶ 2 Joseph Story *Commentaries on the Constitution* §§ 623-628 (1833) reprinted in 2 Philip B. Kurland & Ralph Lerner *The Founders' Constitution* 84-85 (1987). The thrust of his argument is a reversal of Jefferson's and Wilson's fundamental premise of construction. For Justice Story, the establishment of certain qualifications for national legislators by the Constitution, without more, necessarily excludes any exercise of power by the States.

Justice Story's argument opens with the easy assumption that, because the House and Senate were created under the Constitution, there could be no power "reserved" to the States under the Tenth Amendment to affect the qualifications for membership in those bodies. *Id.* § 625. This assumption ignores the existence of a national government prior to the Constitution, and the States' broad power under the Articles of Confederation to control the selection of national legislators.⁷

⁶ Justice Story's argument parallels Madison's statements in *The Federalist* Nos. 53 and 57 (which were publicly available when Justice Story wrote his *Commentaries* in 1833) and Madison's argument at the August 10 debate (which did not appear in print until 1840).

⁷ The Articles of Confederation provided that "delegates shall be annually appointed in such manner as the legislature of each state shall direct" Art. V, cl. 1. The use of the same broad term "manner"

Justice Story further relies on the notion that the Representatives and Senators, like the President, hold uniquely national offices and cannot be controlled by the States.⁸ *Id.* § 626. Again, the argument ignores an essential distinction: the nation as a whole elects the President, but Senators and Representatives represent each State and the people thereof. To allow one State to impose additional qualifications on a Presidential candidate would be to infringe on the rights of other States. No such infringement occurs, however, when a State adopts electoral regulations that affect only its own Representatives and Senators. Such laws do not interfere with a national interest.⁹

by the Framers of the Constitution, U.S. Const. art. I, § 4, cl. 1, suggests that they intended the States to have significant power in this area.

To be sure, the Articles also contained a national term limit in clause two of Article V. "[N]o person shall be capable of being a delegate for more than three years in any term of six years" By its terms, however, this provision did not preclude the States from adopting more restrictive limits if they so chose.

⁸ The argument also fails to take into account that for a time after the adoption of the Constitution there was no national law of U.S. citizenship. Thus a candidate's ability to stand for national legislative office depended on his status as a citizen of the particular State as regulated by that State's law. See Madison's Report of the House Debate on May 22, 1789, in 12 *The Papers of James Madison* 179-82 (William T. Hutchinson, et al. eds. 1979) reprinted in 2 Philip B. Kurland & Ralph Lerner *The Founders' Constitution* 84-85 (1987) (examining eligibility to sit as a member of the House of Representatives as dependent on the State law of citizenship, if the State had such a law).

⁹ Justice Story's requirement of uniformity in elections for national legislative office also ignores the Framers' express choice to permit the States to adopt widely varying practices in defining the electorate for

In addition, Justice Story distinguished between the powers reserved to State legislatures and the power reserved to the people of the States. *Id.* § 627. He could find no explicit delegation of this power over national legislators in any State constitution, so he concluded that any such power existed only in the people of each State but not their legislature. *Id.* To the extent that this argument is valid, it *supports* the constitutionality of Amendment 73 in this case. That provision was not adopted by an act of the Arkansas legislature, rather it was adopted by popular referendum in a direct vote of the people. Amendment 73 thus may be viewed, in Justice Story's terms, as an exercise by the people of the State of Arkansas of the power reserved to them under the Tenth Amendment.

Finally, Justice Story maintains that the national constitution was an act of the whole people, and that power over "functionaries" of the national government—including the power to set qualifications for office—could not be granted to any single state. *Id.* From this construction, Justice Story develops an evidentiary principle of federalism: The States have the burden of proving that they possess a reserved power over federal functionaries, and the States cannot meet their burden merely by relying on the failure of the Constitution to expressly deny them such power. *Id.* Again, Justice Story's analysis fails to recognize the particular nature of the national legislators as representatives of the States. None of these legislators are elected nationwide; indeed,

selecting members of the House of Representatives. Article I, section 2, clause 1 provides that a State's decision concerning who may vote for its most numerous branch of the State legislature determines who may vote for candidates for the House.

the Constitution promotes State representation at the expense of equality of votes by the people as a whole nation by requiring two Senators, U.S. Const. art. I, § 3, cl. 1, and at least one Representative for each State, U.S. Const. art. I, § 2, cl. 3. Because of the hybrid nature of national legislators, their role as participants in the national government does not exclude some significant measure of State control over them.

Echoes of Justice Story's and Madison's analysis are discernable in the reasoning of the Arkansas Supreme Court in this case.

Qualifications set out in the U.S. Constitution, unalterable except by amendment to that document, is a conclusion that makes eminently good sense. There is one watchword for representation of the various states in Congress, it is uniformity. Federal legislators speak to national issues that affect the citizens of every state. Additional age restrictions, residency requirements, or sundry experience criteria established by the states would cause variances in this uniformity and lead to an imbalance among the states with respect to who can sit in Congress. This is precisely what we believe the drafters of the U.S. Constitution intended to avoid.

Pet. App. 14a. This concern for a national "tidiness" with respect to qualifications for Congress fundamentally at odds both with the nature of Senators and Members of the House as representatives of the distinct political communities formed by the States and the values inherent in the Tenth Amendment. The question cannot be resolved by solely relying on Madison's remarks during the debates, later repeated in *The Federalist*. On this issue, those sources do not adequately reflect the sense of the

entire Convention. Judge Wilson's argument during the August 10 debate recognized that there would be "other power of regulating qualifications." *Notes* at 428. Relying solely on the final text of the Constitution itself and the Tenth Amendment, Jefferson independently reached the conclusion that the Constitution "does [not] prohibit to the State the power of declaring . . . disqualifications which [the State's] particular circumstances may call for; and these may be different for different States. Of course, then, by the tenth amendment, the power is reserved to the State." Letter from Thomas Jefferson to Joseph C. Cabell (Jan. 31, 1814) in 11 *The Works of Thomas Jefferson* 379-81 (Paul Leicester Ford ed. Fed. Ed. 1904), reprinted in 2 Philip B. Kurland & Ralph Lerner *The Founders' Constitution* 81 (1987).

B. The Tenth Amendment And The Express Power Of The States To Regulate The "Manner" Of Holding Elections Support The Constitutionality Of Amendment 73.

The task of discerning the precise boundary between federal and State power is, happily, much less onerous where, as here, the State has not attempted to impose additional "qualifications" on candidates for national legislative office, but rather has merely imposed ballot access restrictions. As discussed previously, the Constitution itself commits specific power to the States to act in this area. The "constitutional line between federal and State power" in the election arena is drawn by Article I, Section 4, Clause 1: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the place of choosing Senators."

Thus, States are explicitly granted authority to regulate federal elections *in the first instance*. Cf. *Roudebush v. Hartke*, 405 U.S. at 24 (“Unless Congress acts, Art. I, § 4, empowers the States to regulate the conduct of senatorial [and congressional] elections.”) (emphasis added). Consistent with the Tenth Amendment, therefore, the courts should accord great respect to a State’s exercise of its authority under Article I, Section 4 because the power to regulate elections in the first instance has not been delegated to Congress. Unless Congress acts to “alter” a State’s regulation of federal legislative elections, the courts should not strike down such regulation.

In contrast to *Garcia* and other decisions in which the Court has declined to apply the Tenth Amendment to invalidate an act of Congress as applied to the States, the present case involves no exercise of congressional power. Although it has indeed regulated other aspects of elections for its members, *see, e.g.*, 2 U.S.C. § 2c (1988) (providing, contrary to nineteenth-century practice, that Representatives shall be elected only from single-member districts and not at large), Congress has chosen not to regulate the facet of the electoral process at issue in this case. In the absence of any congressional action prohibiting or preempting the approach adopted by the people of the State of Arkansas in Amendment 73, the power to act in this arena is “reserved to the States, respectively, or to the people.” Cf. *Gregory*, 111 S. Ct. at 2402 (The Tenth Amendment recognizes “the authority of the people of the States to determine the qualifications of their most important government officials.”). In this case, the people of Arkansas, acting in accordance with their State’s procedure for popular initiative and referendum, have exercised one of their reserved powers to prescribe rules for federal legislative elections.

Finally, this analysis accords with the Court’s most recent teachings about the Tenth Amendment and the limits of congressional power under the Commerce Clause: States must look not to the judiciary for any “substantive restraint on the exercise of Commerce Clause powers,” but instead they must rely on “the built-in restraints that our system provides through state participation in federal government action. The political process ensures that [national] laws that unduly burden the States will not be promulgated.” *Garcia*, 469 U.S. at 554, 556; *see also South Carolina v. Baker*, 485 U.S. 505, 512–13 (1988). In the very same manner, the “political process,” not the State or federal courts, should provide any necessary restraint on exercises of States’ authority pursuant to Article I, Section 4 that are alleged unduly to burden national interests.

The Court applied essentially this principle in *Roudebush v. Hartke*, when it concluded that Indiana’s recount procedures could be applied in a senatorial election. The Court acknowledged that “a State’s verification of the accuracy of election results pursuant to its Art. I, § 4, powers is not totally separable from the Senate’s power to judge elections and returns” pursuant to Article I, Section 5, Clause 1. 405 U.S. at 25. The lower court had found these powers inseparable, holding that a recount “would be an usurpation of a power that only the Senate could exercise.” *Id.* at 24. This Court, however, found judicial intervention unjustified, because the Senate had the “ability to make an independent final judgment,” that is, “[t]he Senate [was] free to accept or reject the apparent winner in [the initial count or the recount], and, if it chooses, to conduct its own recount.” *Id.* at 25–26 (footnotes omitted). Accordingly, any perceived burden on national interests was best left to the political process.

Congress will surely act with respect to Amendment 73 and similar initiatives if it perceives that they unduly burden national interests in the election of Senators and Representatives. For the moment, Congress has remained content to permit the genius of our system of federalism to work undisturbed by permitting the States to act as the laboratories of democracy. So long as Amendment 73 does not infringe on the individual rights of any candidate or voter under the First and Fourteenth Amendments—and the petitioners and other parties ably demonstrate that it does not, *see* Br. of State Petitioner at 33-34 n.38; Br. of Respondents Jay Dickey, *et al.* in Support of Petitioners at pt. II—this Court should leave questions concerning the limits of State authority to the political process. Because the decision of the Arkansas Supreme Court does not accord with these principles, this Court should reverse the judgment of that Court and uphold the constitutionality of Arkansas Amendment No. 73.

CONCLUSION

Amendment 73 comports with the Constitution for the reasons expressed in this brief and the briefs filed by the petitioners and other parties in these cases. The judgment of the Arkansas Supreme Court should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

U.S. TERM LIMITS *et al.*,
v. *Petitioners*,
RAY THORNTON, *et al.*,
Respondents.

WINSTON BRYANT, in his official capacity as
Attorney General of Arkansas,
v. *Petitioner*,
BOBBIE E. HILL, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of Arkansas

**BRIEF OF THE UNITED STATES
JUSTICE FOUNDATION AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF THE <i>AMICUS CURIAE</i>	1
SUMMARY OF THE ARGUMENT	2
I. AMENDMENT 73 DOES NOT VIOLATE THE QUALIFICATIONS CLAUSE OF THE CON- STITUTION	3
A. Amendment 73 Is Not an Absolute Bar to the Re-Election of a Long-Term Congressman or Senator	3
B. Amendment 73 Is Consistent With Decisions Upholding State Regulation of the Time, Place and Manner of Congressional Elec- tions	10
II. THE APPROPRIATE STANDARD OF RE- VIEW IS THE RATIONAL BASIS TEST	11
CONCLUSION	16

TABLE OF AUTHORITIES

Cases	Page
<i>Bullock v. Carter</i> , 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972)	10
<i>Clements v. Fashing</i> , 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982)	10
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972)	11
<i>Legislature v. Eu</i> , 54 Cal. 3d 492, 816 P.2d 1309 (1991), <i>cert. denied</i> , 112 S.Ct. 1292 (1992)	12, 13
<i>Nordlinger v. Hahn</i> , 112 S.Ct. 2326 (1992)	2
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	10, 11
<i>Thorsted v. Gregoire</i> , 841 F.Supp. 1068 (W.D. Wash. 1994)	6, 7, 8, 9
<i>U.S. Term Limits v. Hill</i> , 316 Ark. 251 (1994)	3, 6, 10, 12
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968)	11
Constitutional Provisions	
U.S. Constitution, Article I, § 2	3
Article I, § 3	3
Article I, § 4	3, 11
Ark. Const., Amend. 73	<i>passim</i>
Calif. Const., Art. IV, § 1.5	13
Statutes	
Cal. Election Code, § 25003	13
Cal. Proposition 164, § 2, 1992	15
Wash. Rev. Code § 29.04 180	8
Wash. Rev. Code § 29.68	6
Miscellaneous	
Congressional Quarterly's Members, 103rd Congress, Senate and House of Representatives	4, 9
Vital Statistics on Congress, 1993-1994 (Congressional Quarterly and the American Enterprise Institute)	5

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1456

U.S. TERM LIMITS *et al.*,
v. *Petitioners*,

RAY THORNTON, *et al.*,
Respondents.

No. 93-1828

WINSTON BRYANT, in his official capacity as
Attorney General of Arkansas,
v. *Petitioner*,

BOBBIE E. HILL, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of Arkansas

**BRIEF OF THE UNITED STATES
JUSTICE FOUNDATION AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS**

INTERESTS OF THE AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the United States Justice Foundation, a California corporation (the "USJF") submits the following brief *amicus curiae* in support of Petitioners in this action. Written consent to the filing of this brief has been granted by counsel for Petitioners and

Respondents in each consolidated case and such written consents of all parties have been lodged with the Clerk of this Court.

The USJF is a non-profit, tax-exempt California corporation dedicated to the preservation of property, civil and human rights. USJF regularly represents individuals and classes, not only to redress individual acts of injustice, but also to promote important public policy matters. USJF has been active in a variety of issues since it was founded in 1979, including significant developments in the law in the fields of tax limitation and welfare reform. During the Supreme Court's October term, 1991, USJF filed a Motion for Permission to File Brief as Amici Curiae and Brief in Support of Respondents in *Nordlinger v. Hahn*, 112 S.Ct. 2326 (1992), the case in which this honorable Court resolved the constitutionality of the California system of real property taxation.

California enacted a Congressional term limits law, Proposition 164, through the initiative process in 1992. Besides having supporters in Arkansas, USJF has many members, directors and supporters who live and vote in California. Since issues raised in the cases at hand may relate directly to the constitutionality of Proposition 164, USJF has a particular interest in presenting its position in support of Petitioners through this brief *amicus curiae*.

SUMMARY OF ARGUMENT

USJF submits that the Arkansas Supreme Court failed to fully consider the factual and legal implications of the availability of the write-in option for "barred incumbents" seeking re-election to Federal office. If such implications were considered, that Court should have found that "barred incumbents" were not absolutely barred from running for re-election to Federal office. That Court also should have considered Amendment 73's constitutionality as a regulation of the "manner" of elections under Article 1, § 4 of the United States Constitution. If the Court had considered Amendment 73 as a regulation of the

manner of elections, the appropriate constitutional test to apply to the state regulation would have been the rational basis test. The Arkansas Supreme Court received ample evidence to make a determination that the policy behind Amendment 73 has a rational basis, and to find the law as not unconstitutional. In failing to so rule, the Arkansas Supreme Court erred, and should be reversed, and Amendment 73 should be found as not unconstitutional.

I. AMENDMENT 73 DOES NOT VIOLATE THE QUALIFICATIONS CLAUSE OF THE CONSTITUTION.

A. Amendment 73 Is Not an Absolute Bar to the Re-Election of a Long-Term Congressman or Senator.

The Arkansas Supreme Court determined that Amendment 73, a measure directly enacted by the voters of Arkansas, imposed a restriction on a category of candidate's eligibility for a "printed" appearance on a ballot for election to the United States Congress, and that as a result of this restriction a "broad category of persons" was excluded from seeking election to Congress in violation of the Qualification clauses of Article 1, §§ 2 and 3 of the United States Constitution. The Court heard Petitioner's argument that the exclusion was a permissible exercise by the state of the regulatory power of organizing elections pursuant to Article 1 § 4 of the Constitution, and stated,

"... we do not agree, however, that excluding a broad category of persons from seeking election to Congress is a mere regulatory power." *U.S. Term Limits v. Hill*, 316 Ark. 251, 266.

The Supreme Court of Arkansas erred in overstating Amendment 73's reach and underestimating the legal and factual significance of the option available to long-term former and incumbent politicians in Arkansas to be re-elected to Federal office by write-in.

First, the "broad category of persons" seeking election referenced by the Court merits a closer examination. On

the facts, the category of persons identified in Amendment 73 who would be affected by the law is limited to incumbent politicians in Arkansas seeking re-election to the House of Representatives (having served six years) and the Senate (having served twelve years), as well as former office holders who, having reached the relative levels of service, wish to run once again for Federal office.

In any two-year election cycle, there may or may not be a Senate election in Arkansas, given the staggering of elections of Arkansas' two Senators. One of the Senate seats will be up for election in 1998. *Congressional Quarterly's Members, 103rd Congress, Senate*. Arkansas has a total of four members of the House of Representatives. *Congressional Quarterly's Members, 103rd Congress, House of Representatives*. In 1998, for example, if each of these four Congressmen have reached their term limit for purposes of printed ballot status, and *assuming* each of these four, along with the incumbent Senator, will seek re-election, the "broad category of persons . . . seeking election" as referenced by the Court would be a total of five people. This number could of course increase if one or more of Arkansas' retired Members of Congress with the requisite service also decided to seek reelection. Given these facts, it appears that five people may be affected by the law in 1998. Thus, measured by another yardstick, the category is not so broad as stated by the Court.

Perhaps the Arkansas Supreme Court was considering the effect of legislation such as Amendment 73 if implemented by each state or on a national level. In that case, many more incumbent politicians would indeed be affected. While such information is not relevant to the Court's review of the Arkansas law, the national statistics may provide some context for the Arkansas Supreme Court's reference to a "broad category of persons." According to information developed by the Congressional Accountabil-

ity Project ("C.A.P.") of Public Citizen from the publication *Vital Statistics on Congress, 1993-1994*, a joint publication of the Congressional Quarterly and the American Enterprise Institute, pages 20-21, the length of service among the 435 members of the House of Representatives in the current Congress is as follows:

First term:	110
Two terms:	39
Three terms:	38
More than three terms:	248
Total:	<u>435</u>

The mean term of office developed from the statistics was 5.3 years. The median term of office developed from the statistics was 4 years.

As to the Senate, the C.A.P. calculations are as follows:

First term:	30
Two terms:	17
More than two terms:	53
Total:	<u>100</u>

The mean term of office developed from the statistics was 11.3 years. The median term of office developed from the statistics was 12 years.

If applied on a national level, the Arkansas law would have an affect on slightly over half of the compositions of both Houses of Congress. In addition, the respective limits on length of service indicated in Amendment 73 appear consistent with the mean and median lengths of service in the current Congress as calculated by the Congressional Accountability Project. However, the Arkansas law is not intended to apply nationally, and in 1998, the "broad category of persons" it will affect will probably be no more than five people.

But even accepting that this category of politician will be excluded from the printed ballot by Amendment 73, it remains that such persons still have the opportunity to win re-election to Congress by running as a write-in can-

didate consistent with Arkansas law. The Arkansas Supreme Court made a passing reference to the availability of the write-in:

"This effort to dress eligibility to stand for Congress in ballot access clothing, that is, as a regulatory measure falling within the State's ambit under Article 1, § 4, is not without some rational appeal. We do not agree, however, that excluding a broad category of persons from seeking election to Congress is a mere exercise of regulatory power. The intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service. We do recognize that an ineligible congressman under Amendment 73 is not totally disqualified and might run as a write-in candidate for Congress or receive a gubernatorial appointment to fill a vacancy in the same body. Following this thread, the appellants posit that term limitations do not mean disqualification—only ineligibility to be placed on the ballot as a candidate for certain offices. These glimmers of opportunity for those disqualified, though, are faint indeed—so faint in our judgment that they cannot salvage Amendment 73 from constitutional attack. See *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994)." *U.S. Term Limits v. Hill*, 316 Ark. 251, 266.

USJF asserts that the Court's dismissal of the legal and factual implications of the availability of the write-in option in citing to *Thorsted v. Gregoire*, is in error.

The District Court in *Thorsted* did consider the availability of a write-in option in connection with its review of a somewhat similar Washington state term limits law, Initiative 573. (Wash. Rev. Code § 29.68). *Thorsted v. Gregoire*, 841 F.Supp. at 1078. The *Thorsted* court characterized the write-in option in that case as a "pinhole of opportunity." *Id.* Despite the similarities between the Arkansas and Washington state term limit proposals, a significant difference between the two states is the fact

that under Washington state law "Initiative 573 makes incumbents with the specified length of service 'ineligible to appear on the ballot or file a declaration of candidacy.'" (*Emphasis added*). *Thorsted v. Gregoire*, 841 F. Supp. at 1079. The *Thorsted* Court concluded that ineligibility to file a declaration of candidacy would disqualify write-in votes for candidates also barred from the printed ballot, because of a statute in Washington which requires that "One who seeks to be write-in candidate may file a declaration of candidacy not later than the day before the election." *Id.* (Wash. Rev. Code § 29.04.180). The Court stated that "*The measure will thus keep barred incumbents off the ballot no matter what they do.*" *Thorsted v. Gregoire*, 841 F. Supp. at 1079. (*Emphasis added*).

Almost in disregard of its own conclusion of law, the *Thorsted* court then went on to discuss its dissatisfaction with the write-in option, as if it were available, and concluded that the option alone was unconstitutional because the District Court thought it was harder to win election to Congress by write-in:

"Denial of ballot access ordinarily means unelectability. The State concedes that no one in its history has been elected to Congress by a write-in vote. The record shows that in the country as a whole only three candidates for the House have been elected by write-in votes since 1958, and only one candidate for the Senate has been elected by that method since 1954. The Initiative would thus have the practical effect of imposing a new qualification: non-incumbency beyond the specified periods. The intended and probable result would be the same as if the State were to adopt non-incumbency as an absolute requirement." *Thorsted v. Gregoire*, 841 F. Supp. at 1081.

The Arkansas Supreme Court made a startling mistake in citing to *Thorsted*, because, unlike the facts in *Thorsted*, no restriction on the eligibility for the write-in ballot is present in Amendment 73 or otherwise plead regarding

the law of the State of Arkansas. "Barred incumbents" or former office holders who have met the required service can use the write-in option as a method to obtain reelection in Arkansas, and the Arkansas Supreme Court failed to give proper consideration to this important distinguishing factor.

Further, the *Thorsted* court's gloomy dicta in consideration of the hypothetical possibilities of election to Congress by write-in, coupled with the Arkansas Supreme Court's reference to the faint "glimmers of opportunity" presented to candidates by this option, confuses law with politics. Congressman Ron Packard is an example of a current Member of Congress who did win a write-in election:

"No matter how long Packard serves in Congress, nothing in his electoral career is likely to match the tumult of the contest that brought him to Congress and made him one of the few members ever elected as a write-in candidate.

When GOP Rep. Clair W. Burgener announced his retirement in 1982, Packard and 17 other Republicans filed for the primary. Packard, a veteran of Carlsbad city politics, emerged as a front-runner. But he found himself in a pitched battle with recreational vehicle tycoon Johnnie Crean.

A political neophyte, Crean sank close to \$1 million into his bid, which consisted largely of personal attacks on his rivals, some wildly inaccurate. Afterward, Crean blamed his campaign's conduct on his consultants, whom he fired the day after the primary. Crean earned the abiding scorn of many Republicans but won the nomination over Packard by 92 votes.

Many GOP partisans were unhappy with the outcome, and they helped persuade Packard to enter the general election as a write-in candidate. Crean tried to mend fences and reform his image. He argued that Republicans choosing Packard would split

the GOP vote, electing the Democratic nominee, Roy Pat Archer, a professor of government. Party officials came out for Crean, and Packard's funding dried up.

But Packard was still strong at the grass-roots level. While press coverage kept the Crean controversy fresh, Packard sent out 350,000 pieces of mail proclaiming himself the legitimate GOP alternative. On Election Day, his poll workers handed out pencils with Packard's name, urging their use. Packard edged Archer by 8,000 votes. Crean ran third.

Packard has not been seriously challenged since and most recently won re-election by a 2-1 ratio." *Congressional Quarterly's Members, 103rd Congress, House of Representatives.*

The reality is that, although it hasn't happened often in the history of Congressional elections, candidates have indeed been elected to Congress by the write-in ballot. In the case of Ron Packard, 66,441 write-in voters, to be exact, gave him 37% of the total vote (*id.*) and a commanding victory over the official nominees of the Republican and Democratic party, whose names were printed on the ballot. The District Court in *Thorsted* failed to recognize that electability or "unelectability" is more a function of *political* factors than it is a question of legal analysis. "Electability" or "unelectability" is a *political* matter that should not be the determining factor in the review of Amendment 73's constitutionality, where ballot access for a long-term incumbent or former office-holders is otherwise available through a write-in candidacy.

Long-term incumbent politicians have natural advantages over challengers that are made manifestly clear in the preamble to Amendment 73. Such natural advantages of incumbency include high name identification, prestige of office, and usually an advantage in fundraising to finance an effective campaign. The expressions of

opinion articulated by the Arkansas Supreme Court and *Thorsted* Court about the perceived difficulties of "barred incumbents" candidates to mount formidable re-election campaigns as write-ins should be recognized as utter speculation on the part of those Courts.

Finally, in deciding *Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274 (1974), the Supreme Court concluded that a law which barred certain candidates for the House of Representatives from the ballot in California was not unconstitutional. In a footnote, this Court stated, "Moreover, we note that the independent candidate who cannot qualify for the ballot may nevertheless resort to the write-in alternative provided by California law, see §§ 18600-18603 (Supp.1974)." *Storer v. Brown*, 415 U.S. at 736.

The write-in option available in Arkansas consistent with Amendment 73 is more than a meaningless or faint option. A Member of the House of Representatives who has served six years, or a member of the Senate who has served twelve years, and now wishes to seek re-election, has a real opportunity to do so, even though such candidates would be barred from the printed ballot under Amendment 73.

B. Amendment 73 Is Consistent With Decisions Upholding State Regulation of the Time, Place and Manner of Congressional Elections.

While recognizing a candidate does not have a fundamental right to candidacy requiring close scrutiny (*U.S. Term Limits v. Hill*, 316 Ark. 251, 271, citing to *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 3 L.Ed.2d 92 (1972); and *Clements v. Fashing*, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982) (plurality decision)), and that states have more than mere regulatory powers in determining a similar term limit provision covering state legislative and executive offices was constitutionally permissible (*U.S. Term Limits v. Hill*, 316 Ark. at 271), the Arkansas Supreme Court nevertheless invalidated the pro-

visions of Amendment 73. In this regard, the Arkansas Supreme Court failed to recognize the ballot access available to "barred incumbents," and failed to apply the same standard that it employed in reviewing the constitutionality of the term limits provisions for state elected officials.

The Arkansas Supreme Court also failed to recognize the *Storer* Court's observation that "States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, *with respect to both federal and state elections*, the time, place, and manner of holding primary and general elections, the registration and qualification of voters, *and the selection and qualification of candidates*." *Storer v. Brown*, 415 U.S. at 730. (*Emphasis added*).

Had the Arkansas Supreme Court recognized that "barred incumbents" for Federal office have an avenue to election, it should have found Amendment 73 as an otherwise permissible regulation of the manner of elections under Article 1 § 4 of the United States Constitution. In this context, the appropriate analysis should have been whether the state had a rational basis to justify the ballot restriction.

II. THE APPROPRIATE STANDARD OF REVIEW IS THE RATIONAL BASIS TEST.

The test of the constitutionality of an otherwise permissible state election regulation, as articulated in *Storer*, is a consideration of "the facts and circumstances behind the law, the interests which the state claims to be protecting, and the interests of those who are disadvantaged by the classification." *Storer v. Brown*, 415 U.S. at 730, citing to *Williams v. Rhodes*, 393 U.S. 23 at 30 (1968) and *Dunn v. Blumstein*, 405 U.S. 330 at 355 (1972).

In considering the policy behind Amendment 73, the Arkansas Supreme Court reviewed its preamble:

"The people of Arkansas find and declare that elected officials who remain in office too long become

preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of the elected officials." (*id.*, 256.)

The Court then considered the standard of review applicable to the state elected officials:

"However, not every burden on the right to vote is subject to strict scrutiny or requires a compelling state interest to justify it." (*id.*, 271.)

The California Supreme Court considered the effect of a constitutional amendment fixing term limits on elected state officials. *Legislature of the State of California v. Eu*, 54 Cal.3d 492, 286 Cal.Rptr. 283, 816 P.2d 1309 (1991), *cert. denied*, — U.S. —, 112 S.Ct. 1292, 117 L.Ed.2d 516 (1992). The stated policy behind the California amendment, which like Amendment 73 was also adopted by the voters as a ballot proposition, is as follows:

"The people find and declare that the Founding Fathers established a system of representative government based upon free, fair, and competitive elections. The increased concentration of political power in the hands of incumbent representatives has made our electoral system less free, less competitive, and less representative. The ability of legislators to serve unlimited number of terms, to establish their own retirement system, and to pay for staff and support services at state expense contribute heavily to the extremely high number of incumbents who are re-elected. These unfair incumbent advantages discourage qualified candidates from seeking public office and create a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers. These career politicians become repre-

sentatives of the bureaucracy, rather than of the people whom they are elected to represent. To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office, the people find and declare that the powers of incumbency must be limited." (Article IV, § 1.5, California Constitution.)

The California Supreme Court considered the interests of the voters and supporters of certain candidates against the will of the electorate limiting incumbent terms and held that the amendment would prevail irrespective of whether a rational basis standard or a compelling state interest standard was employed. The *Eu* Court stated: "In sum, it would be anomalous to hold that a statewide initiative measure aimed at "restor[ing] a free and democratic system of fair elections," and "encourag[ing] qualified candidates to seek public office" (Cal. Const., art. IV, § 1.5), "is invalid as an unwarranted infringement of the rights to vote and to seek public office." *Legislature of the State of California v. Eu*, 816 P.2d at 1829.

Ample evidence was presented in the current case to allow the court to draw a conclusion that long-term incumbency by Federal elected officials is a detriment, rather than an enhancement, to government. The preamble to Amendment 73 adequately expresses a state policy upon which this Court may conclude that the restriction as applied to the small class of "barred incumbents" has a rational basis, and is therefore not unconstitutional. In failing to weigh the interests of the state against the interests of incumbent politicians, and in failing to consider the interests of Arkansas voters in Federal elections similarly to the interests of those same voters in state elections, the Arkansas Supreme Court erred.

In 1992 voters in California adopted Proposition 164, the California congressional term limits law. Ca. Elec. § 25003. The California law permits write-in candidacies of otherwise "barred incumbents." Ca. Elec. § 25003.(b).

The policy behind the California law is in many respects similar to that found in Amendment 73:

"(a) Federal officeholders who remain in office for extended periods of time become preoccupied with their own reelection and for that reason devote more effort to campaigning for their office than making legislative decisions for the benefit of the People of California.

(b) Federal officeholders have become too closely aligned with the special interest groups who provide contributions and support their reelection campaigns, give them special favors, and lobby the House of Representatives and Senate for special interest legislation, all of which can create corruption or the appearance of corruption of the legislative system.

(c) Entrenched incumbency has discouraged qualified citizens from seeking office and has led to a lack of competitiveness and a decline in robust debate on issues of importance to the People of California.

(d) Due to the appearance of corruption and the lack of competition for the legislative seats held by entrenched incumbents, there has been a reduction in voter participation which is counter-productive in a representative democracy.

(e) The citizens of this state have a compelling interest in preventing corruption and the appearance of corruption by LIMITING [sic] the number of TERMS [sic] which any Senator or Representative representing the People of this state may serve.

(f) The citizens of this state have a compelling interest in preserving the integrity of the ballot by promoting competitive elections and LIMITING [sic] the influence of special interests upon entrenched incumbent legislators.

(g) The citizens of this state have a compelling interest in voting for the candidate and candidates

of their choice, and in standing for and holding elective office, and in preventing the perpetual monopolization of elective offices by incumbents.

(h) The citizens of this state have a compelling interest in extending the equal protection of the laws by ensuring that more of the People of this state have an equal opportunity to stand for and hold elective office." § 2, Findings and Declarations, (a) through (h), Proposition 164, 1992.

Voters in California, Arkansas, and many other states have provided strong support to the idea that long-term incumbency is detrimental to the democratic system. USJF urges this honorable Court to consider the point raised by Petitioners, that the "term limits movement . . . is the most significant grassroots political phenomenon of recent years."¹

However, restrictions on incumbency are nothing new in the history of Republican government. The ancient Roman Republic was presided over for almost five hundred years by a pair of annually elected officials who were known as consuls,² and who by law could not stand for re-election until a fixed time had passed.³ Term limits have been required of Federal executive branch officials for many years, and a growing number of states are adopting term limit provisions not only for their executive branch officials, but also for their state legislators. It is now time for the U.S. Supreme Court to respect the wishes of the citizens of Arkansas and limit the terms of its Members of Congress by upholding the constitutionality of Amendment 73.

¹ See Petitioner U.S. Term Limits "Petition for a Writ of Certiorari," No. 93-1456, Supreme Court of the United States, October Term, 1993, p. 8.

² See generally, *The Founders of the Western World*, by Michael Grant, Scribners, 1991, p. 148.

³ *Fall of the Roman Republic*, [Life of Gaius Marius, paragraph 12], Plutarch, Penguin Classics, 1972, p. 24.

CONCLUSION

For the foregoing reasons, this Court should grant petitioner's claim and find that Amendment 73 is not unconstitutional.

Respectfully submitted,

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12

Nos. 93-1456 and 93-1828

In the
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Respondents.

On Writ of Certiorari to the
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**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE AND BRIEF AMICUS CURIAE
OF CITIZENS FOR TERM LIMITS AND PACIFIC LEGAL
FOUNDATION IN SUPPORT OF PETITIONERS,
WINSTON BRYANT AND U.S. TERM LIMITS**

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280

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In the
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**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE OF CITIZENS FOR TERM
LIMITS AND PACIFIC LEGAL FOUNDATION IN
SUPPORT OF PETITIONERS, WINSTON BRYANT
AND U.S. TERM LIMITS**

Pursuant to Supreme Court Rule 37, Citizens for Term Limits and Pacific Legal Foundation respectfully move this Court for leave to file the attached amicus curiae brief in support of petitioners, Winston Bryant and U.S. Term Limits. Consent to the filing of this brief has been granted by counsel for petitioners State of Arkansas and U.S. Term Limits, and has been lodged with the Clerk of this Court.

Respondents Dale Bumpers, Republican Party of Arkansas, and Americans for Term Limits have also granted consent to the filing of this brief which has been lodged with the Clerk of this Court. Respondent Hill has granted written consent to the filing of this brief and the letter of consent has been lodged with the Clerk of this Court. Respondent Thornton and other respondents have withheld consent, necessitating the filing of this motion.

IDENTITY AND INTERESTS OF AMICI CURIAE

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Citizens for Term Limits (CTL) is the parent organization of the campaign committee that spearheaded the petition drive and campaign support for California's Proposition 164. Proposition 164, like Arkansas' Amendment 73, restricts ballot access of California's congressional incumbents after those incumbents have served for a set number of terms in the House of Representatives and the Senate of the United States. It is Citizens for Term Limits' policy to support congressional term limits in California as well as all other states. Citizens for Term Limits has intervened in the case challenging Washington's Initiative 573, now pending in the Ninth Circuit Court of Appeals (*Thorsted v. Gregoire*, Consolidated Docket Nos. 94-35222, 94-35223, 94-35267, 94-35285, 94-35287,

94-35289, cert. denied sub nom. *Citizens for Term Limits v. Foley*, Docket No. 93-1833 (June 20, 1994)).

Pacific Legal Foundation and Citizens for Term Limits are submitting this brief because they believe their public policy perspective and litigation experience in the ballot access restriction arena will provide an additional viewpoint with respect to the issues presented. PLF and CTL submitted an amicus brief in support of the petition filed in this case. PLF has also participated in numerous other cases before this Court including *Legislature of the State of California v. Eu*, 54 Cal. 3d 492 (1991), cert. denied, ___ U.S. ___, 117 L. Ed. 2d 516 (1992), *Chisom v. Roemer*, 501 U.S. ___, 115 L. Ed. 2d 348 (1991), *League of United Latin American Citizens v. Attorney General of Texas*, 501 U.S. ___, 115 L. Ed. 2d 379 (1991), and *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986).

PLF and Citizens for Term Limits believe the Arkansas Supreme Court incorrectly analyzed the relationship between Amendment 73 and Article I, Sections 2 and 3, of the United States Constitution. The minimal qualifications imposed by Sections 2 and 3 of age, residency, and citizenship are simple, straightforward qualifications that a candidate either possesses or not. Amendment 73, instead of disqualifying certain incumbents from serving, only restricts certain incumbents' names from the ballot for the same office for which they previously served. This is a question of ballot access, not qualifications. When analyzed under this Court's ballot access cases utilizing the framework of the First and Fourteenth Amendments, Amendment 73 must be upheld as constitutional. These points may not be adequately covered by the parties whose interests may not extend beyond the Arkansas borders. Citizens for Term Limits and Pacific Legal Foundation, concerned with preserving ballot access restrictions for California's 54 congressional incumbents and familiar with California's experience with state term limits for the past four years, are uniquely situated

to analyze the issues involved in this case and to bring a wider scope of policy considerations to this Court.

For the foregoing reasons, Citizens for Term Limits and Pacific Legal Foundation request that their motion to file the amicus curiae brief which follows be granted.

DATED: August 15, 1994.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED	ii
INTERESTS OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
I. ARTICLE I, SECTIONS 2 AND 3 DO NOT PREVENT ENACTMENT OF BALLOT ACCESS RESTRICTIONS ON LONGTIME INCUMBENTS . . .	3
A. Ballot Access Restrictions on Longtime Incumbents Are Not Article I Qualifications	4
B. Powell v. McCormack Does Not Forbid State-Imposed Ballot Access Restrictions on Longtime Incumbents	9
C. The Ballot Access Restrictions in Amendment 73 Must Be Upheld	15
III. EXPERIENCE HAS SHOWN THAT BALLOT ACCESS RESTRICTIONS APPLIED TO LEGISLATIVE INCUMBENTS DO NOT DESTROY REPRESENTATIVE GOVERNMENT	22
CONCLUSION	27

TABLE OF AUTHORITIES CITED

	Page
CASES	
Anderson v. Celebrezze, 460 U.S. 780 (1983)	15,20-22
Bullock v. Carter, 405 U.S. 134 (1972)	15-16,21
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Clements v. Fashing, 457 U.S. 957 (1982)	16,21
Hopfmann v. Connolly, 746 F.2d 97 (1st Cir. 1984), vacated on other grounds, 471 U.S. 459 (1985)	7-8
Hopfmann v. Connolly, 769 F.2d 24 (1st Cir. 1985)	7
Legislature v. Eu, 54 Cal. 3d 492, 816 P.2d 1309 (1991), cert. denied, ___ U.S. ___, 117 L. Ed. 2d 516 (1992)	17-18,20,22-23
Miyazawa v. City of Cincinnati, 825 F. Supp. 816 (S.D. Ohio 1993)	22
Nixon v. United States, 506 U.S. ___, 122 L. Ed. 2d 1 (1993)	10
O'Sullivan v. Swanson, 257 N.W. 255 (Neb. 1934)	9
Powell v. McCormack, 395 U.S. 486 (1969)	9-12
Public Citizen, Inc. v. Miller, 813 F. Supp. 821 (N.D. Ga.), aff'd, 992 F.2d 1548 (11th Cir. 1993)	8
Rivera-Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982)	16

State ex rel. Maloney v. McCartney, 159 W. Va. 513, 223 S.E.2d 607, appeal dismissed for want of a federal question sub nom., Moore v. McCartney, 425 U.S. 927 (1976)	17-18
Stiles v. Blunt, 912 F.2d 260 (8th Cir. 1990), cert. denied, 499 U.S. 919 (1991)	16
Storer v. Brown, 415 U.S. 724 (1974)	6-8
United States v. City of Houston, 800 F. Supp. 504 (S.D. Tex. 1992)	19
Zielasko v. State of Ohio, 873 F.2d 957 (6th Cir. 1989)	16

UNITED STATES CONSTITUTION

Article I	2,6,15
§ 2	3-4,27
§ 2, cl. 2	4
§ 3	3-4,8,27
§ 3, cl. 3	4
§ 4	passim
§ 5	10
§ 5, cl. 1	10

MISCELLANEOUS

Barber, Election '94: Insurance Commission, 25 Cal. J. (May 1994)	24
Block, The Term-Limit Babies' First At Bat, 25 Cal. J. (June 1994)	26
Borland, Election '94: Lieutenant Governor, 25 Cal. J. (May 1994)	24
Farrand, The Records of the Federal Convention of 1787 (1966)	11-13
Election '94: Assembly, 25 Cal. J. (May 1994)	23
Election '94: State Senate, 25 Cal. J. (May 1994)	24
Federalist No. 37 (Rossiter ed., 1961)	11
No. 52	11
No. 55	11
No. 60	10
Hill-Holtzman, Seating Now Available: It Used to be That the Only Route to a Westside Assembly Job Went Through the Berman-Waxman Machine. Not Anymore, Los Angeles Times, May 8, 1994	25
Humphrey, Put a Limit on Congressional Terms, U.S.A. Today, Apr. 4, 1990	14

Levy, Can They Throw the Bums Out: The Constitutionality of State-Imposed Congressional Term Limits, 80 Geo. L. J. 1913 (1992)	14
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Pollard, Election '94: Superintendent of Public Instruction, 25 Cal. J. (May 1994)	24
Pollard, Election '94: U.S. Senate, 25 Cal. J. (May 1994)	24
Scott, Election '94: Governor, 25 Cal. J. (May 1994)	24
Scott, Election '94: Treasurer, 25 Cal. J. (May 1994)	24
Skelton, Legislators Try Something New: Action, Los Angeles Times, Sept. 13, 1993	26
Starkey, Election '94: Attorney General, 25 Cal. J. (May 1994)	24
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	Page
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Nos. 93-1456 and 93-1828

In the
Supreme Court of the United States
October Term, 1994

U.S. TERM LIMITS and WINSTON BRYANT,
in his official capacity as Attorney General,
Petitioners,
v.

RAY THORNTON, et al., and BOBBIE E. HILL, et al.,
Respondents.

On Writ of Certiorari to the
Supreme Court of Arkansas

BRIEF AMICUS CURIAE
OF CITIZENS FOR TERM LIMITS
AND PACIFIC LEGAL FOUNDATION IN
SUPPORT OF PETITIONERS, WINSTON BRYANT
AND U.S. TERM LIMITS

INTERESTS OF AMICI CURIAE

The interests of amici curiae are set forth in the
preceding motion and are adopted herein.

SUMMARY OF ARGUMENT

At issue in this case are the provisions of Arkansas' Amendment 73 providing that Arkansas citizens who have had the honor of serving their state in Congress for a certain number of years must henceforth serve in that capacity only if elected by write-in votes should be upheld. Amendment 73 restricts ballot access to multiterm congressional incumbents, but permits such incumbents to serve in their old seats if elected as write-in candidates. Thus, Amendment 73 must be viewed as a ballot access restriction, not as a qualification such as those enumerated in Article I of the United States Constitution. Under the ballot access cases decided by this Court, Amendment 73 does not unconstitutionally infringe on First or Fourteenth Amendment rights. Moreover, California's four years of experience with absolute term limits on members of the state Legislature has demonstrated that such limitations do not spell the end of representative government. For the reasons set forth below, Amendment 73 should be upheld in its entirety and the Arkansas Supreme Court decision should be reversed to the extent it conflicts with such a holding of constitutionality.

ARGUMENT

Without question, the issue of congressional "term limits" is the single most important governance issue to come before this Court in decades. In 1992, no less than 14 states voted (by margins ranging from 52% to 77%) to enact some form of ballot access restriction on the long-term incumbents in Congress. The national groundswell of support for this method of reining in unaccountable political careerists shows the mandate of the People for change in the halls of Congress. Despite the clear election victories for "term

limit" proponents, opponents of the measures have taken their complaints to court. Ruling without the clear guidance of this Court on this issue, courts have erred on the side of the status quo, so far declaring measures affecting congressional elections constitutionally invalid.

I

ARTICLE I, SECTIONS 2 AND 3 DO NOT PREVENT ENACTMENT OF BALLOT ACCESS RESTRICTIONS ON LONGTIME INCUMBENTS

This case involves state elections for members of Congress. Because there are no national elections for congressional office, each state is responsible for conducting elections to determine which of its citizens will be granted the honor and privilege of serving the state in the national legislature. In the House of Representatives, in which each state elects a number of representatives proportionate to the state's population, the representatives are expected to further their states' interests in Congress. In the Senate, in which no one state can overwhelm another by sheer force of numbers, the national interest is expected to prevail. This theory was at the heart of the Connecticut Compromise, which brought the former British colonies together as the United States of America under our Constitution. Wood, *The Creation of the American Republic, 1776-1787* 558 (Univ. of North Carolina Press, 1969). The delicate balance of federal power and state power established by our Founding Fathers provides the backdrop against which the current controversy must be analyzed.

The question presented in this case is whether ballot access restrictions which prevent multiterm congressional incumbents from appearing on the ballot violate Article I, Sections 2 and 3, of the United States Constitution. Section 2, regarding qualifications for the House of Representatives states:

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

U.S. Const. Art. I, § 2, cl. 2. Section 3, regarding qualifications for the United States Senate states:

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

U.S. Const. Art. I, § 3, cl. 3. These two clauses codify what the Framers thought to be the minimum necessary requirements to assure mature, loyal, and patriotic legislators.

A. Ballot Access Restrictions on Longtime Incumbents Are Not Article I Qualifications

The threshold, and most important, question is whether the ballot access restrictions at issue in this case could rise to the level of a qualification. The distinction between ballot access restrictions and qualifications is of obvious constitutional import. Because Amendment 73 permits multiterm incumbent members of Congress to run for their seats as write-in candidates, the court below accuses the drafters of Amendment 73 of attempting to "dress eligibility to stand for Congress in ballot access clothing." *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 266, 872 S.W.2d 349, 357 (1994). The court misses the point. Amendment 73 was not drafted to circumvent the Constitution, but to comply with it. The drafters were aware that term limit opponents claimed that such limits violate Article I, Sections 2 and 3.

Therefore, the initiative-amendment was drafted to avoid the constitutional problem. This was not an attempt to do indirectly what cannot be done directly, but rather an attempt to achieve admirable results in a constitutionally valid manner.¹

The Arkansas Supreme Court explicitly recognized that "an ineligible congressman under Amendment 73 is not totally disqualified and might run as a write-in candidate for Congress or receive a gubernatorial appointment to fill a vacancy in the same body." *Id.* Prior to the issue raised by this case, qualifications were defined to be absolute: either one may serve in Congress or one may not. If a potential candidate for the U.S. Senate is only 27 years old, no amount of brilliance, desire, or campaign warchest will permit her to serve her state in that capacity. The same is true for potential candidates who recently immigrated to this country or who reside outside the borders of the state they wish to represent. Here, however, even the court that struck down Amendment 73 concedes that the provisions of that amendment are not absolute. Once the court ventured beyond the absolute definition of a qualification, it trod upon the treacherous ground of line-drawing. At what point does a ballot access restriction which makes it more difficult to win an election become a qualification? The court below found that "[faint] glimmers of opportunity" to win an election transformed a ballot access restriction into a qualification. The adverse repercussions of this decision, if allowed to stand, will reach far into the election schemes of all states.

¹ Because Amendment 73 is a ballot access restriction, this Court need not address the issue which may arise in cases involving absolute term limits: whether the Qualifications Clause is exclusive or whether the states may add to the list.

The decisions of this Court upholding numerous ballot access restrictions that substantially impair the ability of an individual to win an election strongly suggest that the court below erred in finding that a less-than-absolute ban on serving in Congress could be a qualification. *Storer v. Brown*, 415 U.S. 724 (1974), is the only major case decided by this Court which addresses Article I qualifications in the context of a ballot access restriction. *Storer* makes clear that the denial of ballot access does not establish an additional qualification. *Id.* at 746 n.16. This distinction is based on the constitutional provision giving states the initial task of determining the qualifications of voters who will elect members of Congress. Article I, Section 4, of the United States Constitution authorizes the states to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." *Storer*, 415 U.S. at 730 (brackets in original).

[T]he States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates. ... [T]he rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause.

Storer, 415 U.S. at 730. In *Storer*, this Court upheld a California statute which forbade a ballot position in a general election to an independent candidate if he or she had registered affiliation with a political party within one year prior to the preceding primary election. That statute also required the candidate to file a nominating petition signed by

a number of registered voters of at least 5% of the entire vote cast in the preceding general election. *Storer*, 415 U.S. at 726-27, 733. *Storer* noted that an independent candidate need not stand for primary election but must qualify for the ballot by demonstrating substantial public support in another way. Other than the alternate means of qualifying to have his or her name preprinted on the ballot, the qualifications required of the independent candidate are very similar to, or identical with, those imposed on party candidates. *Storer*, 415 U.S. at 733. "It is an *absolute bar to candidacy, and a valid one.*" *Id.* at 737 (emphasis added). The same case specifically rejected a challenge to the regulations based on Article I, holding such a claim to be "wholly without merit." *Id.* at 746 n.16.

Despite the language in *Storer*, this Court has never had occasion to explicitly state a test to determine whether a restriction amounts to a qualification within the meaning of Article I, Sections 2 and 3. The First Circuit, however, addressed this definitional problem in *Hopfmann v. Connolly*, 746 F.2d 97, 103 (1st Cir. 1984), *vacated on other grounds*, 471 U.S. 459 (1985).² The plaintiff in that case challenged a political party rule that only candidates with 15% of the vote at convention may challenge the convention's endorsement in a state primary. *Id.* at 99. The court held that this rule did not add a qualification for office beyond age, residency, or citizenship. Rather, it adds a restriction on who may run in the party primary in a statewide election for federal office and potentially become the party's nominee. *Id.* at 102. The court emphasized that the candidate was free to run as a write-in. *Id.* at 103. The First Circuit held that the test to determine whether or not the "restriction" amounts to a "qualification" within the

² On remand, the First Circuit stated that its earlier decision on this issue remained undisturbed by the Supreme Court. *Hopfmann v. Connolly*, 769 F.2d 24, 25 n.1 (1st Cir. 1985).

meaning of Article I, Section 3, is whether the candidate "could be elected if his name were written in by a sufficient number of electors." *Hopfmann*, 746 F.2d at 103. This language is consistent with this Court's position in *Storer*. If *Hopfmann* had decided that the unsuccessful candidate in that case had a constitutional right to appear on the ballot, when the candidate already had a means (although less appealing) of reaching the voters as a write-in, this would have greatly expanded the meaning of the Article I, Sections 2 and 3. Neither the plain meaning of the clauses nor this Court's interpretation of the clauses in *Storer* could have led to a different result in *Hopfmann*. Just as the regulations were upheld in *Hopfmann* and *Storer*, so too should Arkansas' Amendment 73 be upheld as a valid ballot access regulation.

The *Hopfmann* case was favorably cited in *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821, 832 (N.D. Ga.), *aff'd*, 992 F.2d 1548 (11th Cir. 1993). That case arose from former Senator Wyche Fowler's loss to Paul Coverdell in a run-off election. Although Fowler himself did not bring suit, a "consumer" organization along with four Fowler supporters sued to overturn Georgia's "majority rule" statute. *Id.* at 824. This statute requires that a candidate must receive a majority of votes cast (instead of a plurality) to be declared the winner. Fowler had won a plurality in the general election but lost the run-off election. *Id.* at 823-24. Addressing the Article I qualifications argument, the court first noted that, based on *Hopfmann's* analysis, Fowler was not precluded from obtaining the office he sought—he simply had to participate in the run-off. *Public Citizen*, 813 F. Supp. at 832. Moreover, the *Public Citizen* court found that the majority vote statute does not violate Article I, Section 3, because "the majority vote statute is more accurately interpreted as a method for construing the meaning of the votes cast." *Id.* at 833. That is, it was construed as regulating the "manner" of elections as provided by Article I, Section 4, of the Constitution. The requirement of receiving

a majority of the votes cast to be elected to the United States Senate was intended to make it more difficult for a candidate to win the seat by demanding a showing of broader support than would be required if a plurality was sufficient to claim victory. As it turned out, this requirement made it impossible for former Senator Fowler to win the seat. *Id.* at 823-24. Yet the fact that the election regulations were very harsh when applied to Senator Fowler does not make those regulations qualifications for office.

An older state case reached the identical conclusion. In *O'Sullivan v. Swanson*, 257 N.W. 255 (Neb. 1934), the Nebraska Supreme Court addressed a statute which prohibited unsuccessful primary candidates from having their names placed on the general election ballot for any state or federal office. The court upheld the law against a challenge from a candidate whose name was not printed on the ballot for United States Senate because he had lost at a primary election for governor during the same election the Senate primary was held. *Id.* at 255-56. The court upheld the statute because it did not prohibit O'Sullivan from running for the office: he was permitted to conduct a write-in campaign. *Id.* at 256. Such might have been a strong practical deterrent to election but, nonetheless, he could run, and the statute was upheld. Again, the crucial point is that the election regulation did not create an absolute bar to service in Congress. The fact that it was extremely difficult to the candidate to be successful in his campaign, did not transmute the ballot access regulation into a constitutional qualification.

B. Powell v. McCormack Does Not Forbid State-Imposed Ballot Access Restrictions on Longtime Incumbents

The court below relied principally on this Court's decision in *Powell v. McCormack*, 395 U.S. 486 (1969), to strike down Amendment 73. *Powell* involved the refusal of

the House of Representatives to seat Adam Clayton Powell, an elected representative of New York, who had been accused of wrongfully diverting federal funds to himself, his wife, and his staff. *Id.* at 490. *Powell* centered on the authority of the House to exclude Powell under Article I, Section 5, of the Constitution which provides that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members." Before reaching its decision, the Court engaged in an extensive review of historical materials, most of which did not apply to Article I, Section 5, Clause 1. More than the actual holding of *Powell*, the court below relied on the historical review in striking down Amendment 73.

The court below cited Alexander Hamilton's statement in Federalist No. 60 that "qualifications ... are defined and fixed in the Constitution and are unalterable by the legislature" to support its conclusion, even though the court acknowledged that the passage refers only to alterations made by Congress. *Hill*, 316 Ark. at 264, 872 S.W.2d at 356. The context of the Federalist Papers was an explanation of the *federal* government, all its institutions and powers. Federalist No. 60 is no exception. This Court in *Powell*, 395 U.S. at 539, relied on this passage for the conclusion that the House of Representatives could not add a qualification which would prevent a duly elected member of the body from taking his seat. This Court recently reiterated the narrow holding of that case, noting that *Powell* stands for the proposition that "[t]he decision as to whether a member satisfied these qualifications was placed with the House, but the decision as to what these qualifications consisted of was not." *Nixon v. United States*, 506 U.S. ___, 122 L. Ed. 2d 1, 14 (1993) (emphasis in original).

Although the court below found "illuminating" the historical recitations in *Powell* (*Hill*, 316 Ark. at 265, 872 S.W.2d at 356), *Powell's* description of the historical forces at work is incomplete. For example, Madison's

recognition that some members of Congress might achieve perpetual reelection (in Federalist No. 55) does not alter his overall view that frequent elections would result in frequent turnover: "A frequent change of men will result from a frequent return of elections; and a frequent change of measures from a frequent change of men." Federalist No. 37, at 227 (Rossiter ed., 1961). Madison was a strong proponent of frequent elections for this very reason. Notwithstanding the *possibility* of long-term service in the Congress, Madison believed frequent turnover strongly benefited the new republic.

The Framers sought to solve the dilemma of expertise versus interaction with constituents by creating two houses--one with a two year term and one with a six year term. The house designed by the Framers to be most responsive to the People (the House of Representatives) had the most frequent elections. As noted, frequent elections were intended to ensure frequent turnover in members of the House.³ Now that members of the Senate as well as the House are chosen directly by the electorate, the policy reasons for frequent elections (and frequent turnover) are just as powerful for the Senate. It is the length (not the number) of terms that determines stability.⁴ The Founders designed Senate terms

³ "[The House of Representatives should have] an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured." Federalist No. 52, at 327.

⁴ At the constitutional convention, the Founders debated the need for annual or biennial elections for House members on June 21, 1787. Representative of the comments made in support of annual elections was that of Mr. Roger Sherman: "Should the members have a longer duration of service, and
(continued...)

three times the length of House terms to provide the stability necessary for any government. Farrand Vol. 1 at 415, 423. Under Amendment 73, Senators representing the State of Arkansas may (assuming reelection) have their names on the ballot for 2 terms, or 12 years. This is double the length of time the Founders believed necessary to assure stability.

Because of the limited nature of the actual question decided in *Powell*, that case did not fully address the policy and political ramifications of Article I, Section 4, on state's abilities to regulate congressional elections. This omission (completely understandable in the context of *Powell*) is the critical issue in this case. Article I, Section 4, provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." The last clause of the section provides for a congressional override of state election laws.

The state ratifying conventions shed some light on the interpretation of Section 4. For example, the nature of the congressional override was depicted in a dialogue between James Madison and James Monroe during the Virginia ratification debates. Monroe wanted to know why Congress had "ultimate controul over the time, place, and manner of elections of representatives, and the time and manner of that of senators." Debate in the Virginia (ratification)

⁴ (...continued)

remain at the seat of government, they may forget their constituents [sic], and perhaps imbibe the interest of the state in which they reside, or there may be danger of catching the *esprit de corps*." Farrand, *The Records of the Federal Convention of 1787*, Vol. 1 (1966) (Farrand) at 365.

Convention, Farrand Vol. 3 (Appendix A, CCX), at 311-12. Madison replied that the concern was that

[s]ome states might regulate the elections on the principles of equality, and others might regulate them otherwise. This diversity would be obviously unjust. ... Should the people of any state, by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government.

Id. at 311. Madison's concern was not with state regulation of candidates, but with assuring voters a right to vote. Madison reiterated the impracticability of micromanaging each state's elections. This is why the language in the Constitution grants broad authority to the states to conduct federal elections but permits congressional override. *Id.* Madison concluded his comments to Monroe: "But if [elections] be regulated properly by the state legislatures, the congressional controul will very probably never be exercised." *Id.* State leaders's explicit dismay during the ratification debates over Congress' control over elections demonstrates their understanding that Congress had usurped a traditional state power by the very existence of the ability to override state regulation.

This interpretation leads to the conclusion that the states could, and were expected to, regulate elections in any number of particulars. However, should states fall lax in their duties to conduct elections to send representatives to the federal legislature, Congress could alter or overrule the state's election laws so as to assure each state's participation in the federal government. The Anti-Federalists found this safety mechanism so overpowering as to render the initial ability to enact election regulations worthless. This response

is unquestionably based on the belief that Congress' power exceeds that of states on this issue.

Members of Congress who oppose ballot access restrictions (including those who brought this lawsuit) have a remedy at hand. Article I, Section 4, of the Constitution permits congressional override of state election regulations. Amici recognize the political difficulties inherent in such a remedy when 70% of Americans favor such measures. Levy, *Can They Throw the Bums Out: The Constitutionality of State-Imposed Congressional Term Limits*, 80 GEO. L. J. 1913, 1916 (1992) (citing Humphrey, *Put a Limit on Congressional Terms*, U.S.A. Today, Apr. 4, 1990, at A12). Getting a majority in Congress to support such a bill may well be difficult, even with the support of the Speaker of the House.⁵ Nevertheless, it is the availability of the remedy, not the political expediencies attached to it, that is constitutionally significant.

The narrow holding of *Powell* combined with the broad intent and language of Article I, Section 4, gives this Court ample reason to decide this case in a way that neither overrules *Powell* nor strikes down Amendment 73. Ultimately, given the language of Section 4, the ability of Congress to fashion its own remedy, and the ability of Amendment 73 to withstand other constitutional attacks (see below), the ballot access restrictions on multiterm incumbents should be fully upheld.

⁵ Speaker of the House Thomas Foley (D-Wash.) is an appellee in the Ninth Circuit case currently pending to review a District Court's invalidation of Washington's ballot access restrictions on multiterm incumbents. *Gregoire v. Thorsted* (pending).

C. The Ballot Access Restrictions in Amendment 73 Must Be Upheld

The Arkansas Supreme Court's erroneous decision stems from its analysis of Amendment 73 under the wrong provision of the U.S. Constitution. As described above, Amendment 73 cannot be a qualification under Article I because an incumbent barred from the ballot could still serve if elected or appointed. The plurality opinion below erroneously invalidated the congressional officeholder provisions of Amendment 73 on Article I grounds and never addressed the ballot access cases in that context.

In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), this Court described the balancing test that must be applied to ballot access restrictions. This test, which is the standard of review, consists of the following elements:

[A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson, 460 U.S. at 789.

The right to hold public office, by itself, is not a fundamental right. *Bullock v. Carter*, 405 U.S. 134, 142-43

(1972); *Clements v. Fashing*, 457 U.S. 957 (1982). In *Clements*, 457 U.S. at 963, this Court held that "[f]ar from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.'" See also *Stiles v. Blunt*, 912 F.2d 260, 265 (8th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991) ("[c]ontrary to appellant's assertion, the right to run for public office, unlike the right to vote, is not a fundamental right"); and *Zielasko v. State of Ohio*, 873 F.2d 957, 959 (6th Cir. 1989) ("contrary to Zielasko and Bowman's assertions, running for office is not a 'fundamental right'"). Because the right to candidacy, in and of itself is not fundamental, the state's interests need only be legitimate to outweigh incumbents' ability to run for reelection in perpetuity.

Moreover, the rights of supporters of multiterm incumbents have not been unduly infringed. Notwithstanding the fact that the right to vote has been characterized as fundamental, that right is not absolute. In *Rivera-Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982), the Supreme Court upheld a Puerto Rico law which provided that if a commonwealth legislator died or resigned in office, the party of which the vacating legislator was a member had the right either to fill the empty seat outright, or hold an election for the seat, with only party members eligible to vote. The appointee could serve up to 40 months until the next election. The plaintiffs in that case argued that all voters had an absolute right to cast votes in the election to fill the vacant legislative seat. This Court, in upholding the law, stated that "this Court has often noted that the Constitution 'does not confer the right of suffrage upon any one.'" *Id.* at 9 (citations omitted). This Court also noted that "[a]bsent some clear constitutional limitation," a state is "free to structure its political system to meet its 'special concerns and political circumstances.'" *Rivera-Rodriguez*, 457 U.S. at 13-14.

The compelling interests supporting rotation in office are already documented in case law and elsewhere. The policy reasons in favor of term limitation were amply explored in *Legislature v. Eu*, 54 Cal. 3d 492; 816 P.2d 1309 (1991), *cert. denied*, ___ U.S. ___, 117 L. Ed. 2d 516 (1992). The California Supreme Court accepted the arguments that

the state's strong interests in protecting against an entrenched, dynastic legislative bureaucracy, and in thereby encouraging new candidates to seek public office, are both legitimate and compelling ones that support a lifetime ban from the office and outweigh any interest the incumbent legislators, or the voting public, may have in perpetuating the incumbents' positions of control.

Eu, 54 Cal. 3d at 520, 816 P.2d at 1326. Furthermore, the court firmly recognized the advantages that are inherent in the incumbency: "Whether by reason of superior fund raising ability, greater media coverage, larger and more experienced staffs, greater name recognition among the voters, favorably drawn voting districts, or other factors, incumbents do indeed appear to enjoy considerable advantages over other candidates." *Id.* at 523, 816 P.2d at 1327-28.

Other courts have reached the same conclusion, which this Court has implicitly accepted. In *State ex rel. Maloney v. McCartney*, 159 W. Va. 513, 223 S.E.2d 607, *appeal dismissed for want of a federal question sub nom.*, *Moore v. McCartney*, 425 U.S. 927 (1976), the West Virginia Supreme Court upheld a two term limitation on the Governor's Office, specifically rejecting the claim that the law was undemocratic. The court stated:

The universal authority is that restriction upon the succession of incumbents serves a rational public

policy and that, while restrictions may deny qualified men an opportunity to serve, as a general rule the over-all health of the body politic is enhanced by limitations on continuous tenure.

... The power of incumbent officeholders to develop networks of patronage and attendant capacities to deliver favorably disposed voters to the polls raised fears of an entrenched political machine which could effectively foreclose access to the political process.

... [I]t has long been felt that a limitation upon succession of incumbents removes the temptation to prostitute the government to the perpetuation of a particular administration. ... While elections are won by 51% of the vote, all of the people of a state must be served. Meretricious policies which sacrifice the well-being of the economic, social, racial, or geographical minorities are most likely where a political figure, political party, or political interest group can rely upon electorate inertia fostered by the hopelessness of encountering a seemingly invincible political machine.

Eu, 54 Cal. 3d at 520-21, 816 P.2d at 1327-28 (citations omitted). The California Supreme Court held that "many, if not all, of the considerations mentioned in *Maloney* (e.g., eliminating unfair incumbent advantages, dislodging entrenched political machines, restoring open access to the political process, and stimulating electorate participation) would apply with equal force to the legislative branch." *Id.* at 521, 816 P.2d at 1326. The court concluded that *Maloney's* analysis was pertinent to the decision before it, and that "permanent incumbency limitations are supported by legitimate and compelling considerations." *Id.* at 522, 816 P.2d at 1327.

In addition, Arkansas has a legitimate interest in restricting ballot access of multiterm incumbents to encourage the participation of women and minorities in Congress. A three-judge federal District Court recently recognized that advantages of incumbency that would otherwise dilute minority opportunities can be corrected by term limitations. *United States v. City of Houston*, 800 F. Supp. 504, 507 (S.D. Tex. 1992) (before it required a special election, the Justice Department should have considered city council term limits approved by voters as an effective means of increasing minority opportunities).

Historically, virtually all of the women and minorities who have been elected to either the House or the Senate were first elected in open seats. Of the 24 new women members of the House of Representatives in the 103d Congress, 21 were elected in open seats in 1992. Of the 47 women House members of the 103d Congress, 79% were elected in open seats. Of the seven female Senators currently serving, all but one were elected in open seats (or one in which an appointed Senator was seeking a first elected term). None of the 14 other women who have previously served as Senators defeated an incumbent member of the Senate to obtain that office. *Politics in America, 1994: The 103d Congress* (CQ Press 1993); *Women in the United States Senate*, Senate Historical Office (from U.S. Congress, House, *Women in Congress*, H. Doc. 238, 101st Cong. 2d Sess. 1991); *To Be Continued: A Study of Democratic Women's Races for the House of Representatives in 1992*, Reprint of Staton-Hughes prepared for EMILY's List (1993). Moreover, most minority members of the 103d Congress were first elected in open seats: 33 of the 38 (87%) African-American members of the House and 15 of the 18 Hispanic members. In addition, the first and only Korean-American Representative and the only American Indian Senator were elected in open seats. *Politics in America, 1994: The 103d Congress* (CQ Press 1993).

In *Anderson*, in the context of striking down a state statute that unduly restricted the ability of new and smaller parties to obtain ballot status, this Court observed that "[h]istorically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream." *Anderson*, 460 U.S. at 794. The Court stressed that the primary values to be protected in ballot access cases is the promotion of uninhibited, robust, and wide-open debate on public issues. *Id.* By its very nature, a system in which incumbents are encouraged to depart from office will allow election campaigns to assume a more vibrant role in the shaping of public policy.

A balancing of any injury caused to candidates and voters against the interest of Arkansas in enacting Amendment 73 demonstrates that the state's interest substantially outweighs any incidental burden on the candidates' and voters' rights. Legislators have no fundamental right to hold office indefinitely; and voters are not prevented from voting for another candidate who shares their views. As stated by the California Supreme Court:

[I]t would be anomalous to hold that a statewide initiative measure aimed at "restor[ing] a free and democratic system of fair elections," and "encourag[ing] qualified candidates to seek public office" ... is invalid as an unwarranted infringement of the rights to vote and to seek public office. We conclude the legitimate and compelling interests set forth in the measure outweigh the narrower interests of petitioner legislators and the constituents who wish to perpetuate their incumbency.

Eu, 54 Cal. 3d at 524-25, 816 P.2d at 1329 (brackets added and in original).

Importantly, the court below did address this Court's ballot access cases in the context of ballot access restrictions for *state* legislators, thus indicating the result it would have reached (and *should* have reached) had these cases been applied to the provisions affecting congressional officeholders. *Hill*, 316 Ark. at 270, 872 S.W.2d at 359. In the state legislator context, the court followed the decisions of this Court in *Burdick v. Takushi*, 504 U.S. ___, 119 L. Ed. 2d 245 (1992), *Anderson*, 460 U.S. 780, *Clements*, 457 U.S. 957, and *Bullock*, 405 U.S. 134. *Id.* After weighing the interests of the incumbents in perpetuating their careers against the People's desire to encourage rotation in office to promote greater accountability and responsiveness in their representatives, the Arkansas court concluded,

the state interest, as expressed in the Preamble to Amendment 73, is sufficiently rational and *even compelling* when weighed against the residual burden placed on the rights and privileges of elected officeholders and those desiring to support them.

Id. at 272, 872 S.W.2d at 360 (emphasis added).

In dissent, one Arkansas justice did reach the ballot access issue with respect to congressional officeholders. Special Chief Justice Cracraft based his opinion on the very distinction the plurality refused to acknowledge: "I do not view the provisions of Amendment 73 to the Arkansas Constitution as raising a 'qualifications' issue, but rather a ballot access issue to be measured by the First and Fourteenth Amendments to the United States Constitution." *Hill*, 316 Ark. at 284, 872 S.W.2d at 368. Justice Cracraft notes that Article I, Sections 2 and 3, begin with the phrase "[n]o person shall *be*" a representative or senator, a choice of words demonstrating a reference to *service* in Congress, not the manner of election. *Hill*, 316 Ark. at 286, 872 S.W.2d at 369 (emphasis in original; brackets in

original). Justice Cracraft then properly examined the initiative in light of the First and Fourteenth Amendments (citing *Anderson* and *Burdick*). He found it "not constitutionally infirm in any respect." *Id.* The importance of analyzing Amendment 73 as a ballot access measure cannot be understated. The decisions of this Court analyzing ballot access measures under the First and Fourteenth Amendment have established a framework under which provisions such as Amendment 73 can be easily upheld. See *Legislature v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309; *Miyazawa v. City of Cincinnati*, 825 F. Supp. 816 (S.D. Ohio 1993).

III

EXPERIENCE HAS SHOWN THAT BALLOT ACCESS RESTRICTIONS APPLIED TO LEGISLATIVE INCUMBENTS DO NOT DESTROY REPRESENTATIVE GOVERNMENT

When the People of California enacted Proposition 140, the Political Reform Act of 1990, the state Legislature was sure the world was ending. Proposition 140 imposed absolute term limits on all members of the California Legislature as well as the executive constitutional officers. In addition, Proposition 140 substantially reduced legislative spending and eliminated the legislative retirement plan. Naturally, California legislators proclaimed the end of effective legislative governance.

The California experience is particularly analogous to what Congress can expect as more and more incumbents are subject to ballot access restrictions or term limits. California is the nation's largest state in terms of population, budget, natural disasters, and social problems (including immigration, race riots, and so forth). California has a highly professionalized Legislature, complete with legions of staff members to assist with both policy and political issues. Also, California has operated for the past 12 years with a

Republican governor and a Democratic Legislature--a circumstance not unknown in Washington, D.C.

In the four years since term limits were enacted and upheld by the California Supreme Court (*Legislature v. Eu*, 54 Cal. 3d 492), positive effects already have been felt throughout the state. One of the primary goals of term limits--to increase the competition level of elections--has arrived with gusto.

There are 80 seats in the California Assembly (the lower house). Of the 80 members who served in 1992, 24 will not be running for the same seat in 1994. Note that this is before any Assembly member is required to leave under the terms of Proposition 140 in 1996. Of those 24 members leaving the Assembly, 10 are seeking statewide office this year, 5 are seeking state Senate seats, 1 is a candidate for a Superior Court judgeship, and 1 is running for Congress. Others are returning to the private sector or other state and local government agencies. *Election '94: Assembly*, 25 Cal. J. 36-45 (May 1994).

There are 40 members in the California Senate. Senators serve staggered terms, with half of the seats up for election every two years. With the exception of one Senator who switched districts to finish out the term of a Senator who had been convicted of corruption, and who will be term limited out of office this year, other Senators will not face the term limits until 1998. Nevertheless, nine Senators have left the Senate this year. Four are seeking statewide office and one has gone to Congress. Interestingly, the movement between the Assembly, Senate, and Congress has not been all one way. Former California Congressman Tom Campbell returned to the California Legislature when state Senator Rebecca Morgan resigned to chair "Joint Venture," an entrepreneurial organization in Silicon Valley, and Representative Campbell lost the 1992 primary for a United

States Senate seat. *Election '94: State Senate*, 25 Cal. J. 31-35 (May 1994).

There are a number of lessons to be drawn from California's experience so far. First, just because legislators may no longer run for the same seats they have held for years does not necessarily mean the State of California will be deprived of their expertise in state government. On the contrary, there has been far greater interest on the part of legislators in statewide offices and other legislative seats. Term limits has not thrust those experienced legislators who still retain significant public support into political oblivion; rather, term limits has opened new opportunities for these legislators to serve the state in different capacities. Former Assembly members have relinquished their seats to run for state controller, state superintendent of public instruction, a superior court judgeship, State Board of Equalization, state Insurance Commissioner, Secretary of State, Attorney General, Lieutenant Governor, and of course, the state Senate. One former Assembly member is also running for Congress. Among the retiring state Senators, several entered primary elections for the offices of Governor, State Board of Equalization, state Treasurer, state Insurance Commissioner, and Lieutenant Governor. One is running for a seat on the Orange County Board of Supervisors. Scott, *Election '94: Governor*, 25 Cal. J. 8 (May 1994); Pollard, *Election '94: U.S. Senate*, 25 Cal. J. 11 (May 1994); Barber, *Election '94: Insurance Commissioner*, 25 Cal. J. 13 (May 1994); Borland, *Election '94: Lieutenant Governor*, 25 Cal. J. 16 (May 1994); Scott, *Election '94: Treasurer*, 25 Cal. J. 16 (May 1994); Starkey, *Election '94: Secretary of State*, 25 Cal. J. 17 (May 1994); Starkey, *Election '94: Attorney General*, 25 Cal. J. 18 (May 1994); Pollard, *Election '94: Superintendent of Public Instruction*, 25 Cal. J. 18 (1994).

Second, term limits has created more competitive elections. In the 1994 primaries, incumbent candidates faced numerous challenges. For example, for more than 20 years

the Westside area of Los Angeles was completely controlled by the political organization headed by Howard Berman and Henry Waxman. Legislators handpicked by the Berman-Waxman machine tended to stay in office forever--or until a demographically friendly congressional seat opened up. However, facing term limits in 1996, the three Assembly Democrats representing this area gave up their seats to run for statewide offices. In the June, 1994, primary, 22 Democratic and 5 Republican candidates vied for the privilege of serving Westside voters. The Berman-Waxman organization remained largely silent throughout the primary season. This silence may be the harbinger of a corollary benefit: the dismantling (or at least the lessening of significance) of political machines. Hill-Holtzman, *Seating Now Available: It Used to be That the Only Route to a Westside Assembly Job Went Through the Berman-Waxman Machine. Not Anymore*, Los Angeles Times, May 8, 1994, at J12. With California's 120 state legislative seats, 54 congressional seats, dozens of statewide offices (including administrative agencies), and literally hundreds of local government positions available, politicians who cannot bear the thought of working in the private sector have many other options available to them. Similarly, members of Congress who must run for reelection as a write-in candidate will consider the myriad opportunities otherwise available in public service. A change in scenery provides the growth and depth of experience that should be required of all lawmakers.

Third, the increased number of open seats has presented strong opportunities for women and minorities to make gains in their electability. Voters elected 16 men and 12 women in 1992, bringing the number of women in the Assembly to an all-time high of 22. The six Latinos elected in 1992 increases their numbers in the Assembly to seven from the previous high of four. The one new African-American elected in 1992 maintained the number of blacks in the Assembly at seven. The Class of 1992 also included the first Asian-American elected to the Legislature in 14

years. The 8 ethnic minority members elected to the Assembly compares to just 2 in the 24-member class elected in 1982. Weintraub, *After the Elections, State Assembly: 28 Newcomers Bring a Sense of Purpose*, Los Angeles Times, Nov. 8, 1992, at A3.

Fourth, the legislators elected under term limits are not complete political novices. Most have political experience in local government or community projects. For example, of the eight freshman in 1992 designated as the best of the class by the California Journal, one is a former community college trustee, two are former mayors, one is a former vice-mayor, one is a former deputy county counsel, two are attorneys (one of whom spent some time as a lobbyist), and one is a former sheriff. Block, *The Term-Limit Babies' First At Bat*, 25 Cal. J. 8 (June 1994). Many other members, although not active in local politics, bring to the Legislature real-life experiences in every facet of California society. For example, the Class of 1992 contained a home builder, a retired U.S. Air Force fighter pilot, a school teacher, an interior designer, an insurance company executive, and the owner of a chain of video stores. *Id.*

Finally, new faces in the Legislature do not diminish that body's ability to perform its lawmaking function. Even though the 1992 elections brought the highest number (32) of freshman legislators since 1978 (the year of the Proposition 13 tax revolt), the 1993 Legislature was hailed as one of the most productive in years. Skelton, *Legislators Try Something New: Action*, Los Angeles Times, Sept. 13, 1993, at A3. Moreover, the front page of the *Los Angeles Times* announced that "the California Legislature's 1993 session so exceeded the expectations of those trying to fix the battered economy that it is being described as a watershed in the state's posture toward business." Woutat, *State's Help for Business Seen as Watershed Shift*, Los Angeles Times, Sept. 13, 1993, at A1. The infusion of new legislators helped break the gridlock that has paralyzed the California

Legislature, leading to a promising new trend that should be replicated in Congress.

CONCLUSION

For the reasons stated herein, the decision of the Arkansas Supreme Court as it relates to congressional incumbents should be reversed. Amendment 73, which limits ballot access to multiterm congressional incumbents, does not impose any new qualifications that contradict the qualifications set forth in Article I, Sections 2 and 3, of the United States Constitution. Any multiterm incumbent may serve if elected by write-in or if appointed to the seat. The ballot access restrictions on multiterm incumbents should be analyzed under the same framework as any other ballot access restriction. Under this framework, Arkansas' Amendment 73 should be upheld in its entirety.

DATED: August, 1994.

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Nos. 93-1456 and 93-1828

IN THE
Supreme Court of The United States
OCTOBER TERM, 1994

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v. *Petitioners,*

RAY THORNTON, *et al.*,
Respondents.

STATE OF ARKANSAS *ex rel.* WINSTON BRYANT,
ATTORNEY GENERAL OF THE STATE OF ARKANSAS,
v. *Petitioner,*

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On Writ Of Certiorari
To The Supreme Court Of Arkansas

BRIEF OF CITIZENS UNITED FOUNDATION AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iv
INTEREST OF CITIZENS UNITED FOUNDATION	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. UNDER <i>POWELL</i> 'S THREE-FACTOR HISTORICAL ANALYSIS, THE STATES CLEARLY RETAINED THE AUTHORITY TO ADD TO THE CONGRESSIONAL QUALIFICATIONS SET FORTH IN THE CONSTITUTION	6
A. COLONIAL AND PRE-FEDERAL CONVENTION PRECEDENTS ESTABLISH THAT THE AUTHORITY TO PRESCRIBE QUALIFICATIONS FOR CONGRESSIONAL OFFICE WAS AMONG THE SOVEREIGN POWERS HISTORICALLY VESTED IN THE STATES	8
1. Colonial America	8
2. The Articles of Confederation	10
3. Appointment to the Federal Convention	11

	<u>Page</u>
B. THE DEBATES OF THE FEDERAL CONSTITUTIONAL CONVENTION, AS WELL AS THE DEBATES AND COMMENTARIES DURING THE STATE RATIFICATION PROCESS, DOCUMENT THAT THE FRAMERS DID NOT INTEND FOR THE QUALIFICATIONS CLAUSES TO BE ABSOLUTE	12
1. Debates of the Federal Convention	12
2. The State Ratification Debates and Commentaries	15
C. THE POST-RATIFICATION PRACTICES OF THE STATES FURTHER REINFORCE THE VIEW THAT THE STATES RETAINED THE AUTHORITY TO ADD TO THE REQUISITES FOR CONGRESSIONAL OFFICE ENUMERATED IN THE CONSTITUTION	19
D. APPLICATION OF <i>POWELL</i> 'S THREE-FACTOR ANALYSIS CONVINCINGLY SUPPORTS THE POWER AND RIGHT OF RESIDENTS OF THE SEVERAL STATES TO PRESCRIBE QUALIFICATIONS FOR CONGRESSIONAL OFFICE	22
II. THE TENTH AMENDMENT CONFIRMS STATE POWER TO ENACT CONGRESSIONAL BALLOT ACCESS LIMITATION LAWS	22

	<u>Page</u>
III. THE SUPREME COURT OF ARKANSAS MISREAD THE ORIGINAL INTENT OF THE FRAMERS, MISCONSTRUED <i>POWELL</i> AND IMPROPERLY ANALYZED THE POWERS OF THE STATES UNDER THE TENTH AMENDMENT	26
A. THE ARKANSAS COURT MISCONSTRUED SEVERAL IMPORTANT AUTHORITIES	27
B. IMPORTANT AUTHORITIES WERE IGNORED BY THE SUPREME COURT OF ARKANSAS	29
C. THE SUPREME COURT OF ARKANSAS MISJUDGED THE FRAMERS' INTENT	29
CONCLUSION	30
APPENDIX	A-1

TABLE OF AUTHORITIES

Cases	Page
<i>Clements v. Fashing</i> , 457 U.S. 957 (1982)	5,21
<i>Dillon v. Fiorina</i> , 340 F.Supp. 729 (D. New Mex. (1972))	21
<i>Hellmann v. Collier</i> , 217 Md. 93, 141 A.2d. 908 (1958)	20
<i>Jenness v. Fortson</i> , 403 U.S. 431 (1971).	5
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819)	26
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969) . . .	passim
<i>Stack v. Adams</i> , 315 F.Supp. 1295 (N.D. Fla. 1970)	21
<i>State ex rel. Chandler v. Howell</i> , 104 Wash. 99, 175 P. 569 (1918)	21
<i>Stockton v. McFarland</i> , 56 Ariz. 138, 106 P.2d 328 (1940)	21
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	5
<i>Thorsted v. Gregoire</i> , 841 F.Supp. 1068 (W.D. Wash. 1994)	26,27
<i>U.S. Term Limits, Inc. v. Hill</i> , 316 Ark. 251, 872 S.W.2d 349 (1994)	4,7,27,28
Constitutional Provisions	
U.S. Constitution, Article I, § 2, cl. 2	4,5,7,10
Article I, § 3, cl. 3	4,5,7,10,14
Article I, § 3, cl. 7	5
Article I, § 4, cl. 1	10
Article I, § 5, cl. 1	7
Article I, § 6, cl. 2	5
Article III, § 2	26,27
Article VI, cl. 2	25,26
Article VI, cl. 3	5

	Page
U.S. Constitution, Tenth Amendment	passim
Md. Const. of 1776, art. XXVII, <i>reprinted</i> in 3 FEDERAL AND STATE CONSTITUTIONS 1695 (F. Thorpe, ed. 1909)	9
N.H. Const. of 1784, <i>reprinted</i> in 4 FEDERAL AND STATE CONSTITUTIONS 2453 (F. Thorpe, ed. 1909)	11
Pa. Const. of 1776, § 11, <i>reprinted</i> in 3 FEDERAL AND STATE CONSTITUTIONS 3005 (F. Thorpe, ed. 1909)	9
Statutes	
An Act Limiting the Time for Continuing the Delegates to General Congress in Office, and Making Provisions for Their Support, and for Other Purposes, <i>reprinted</i> in 9 STATUTES AT LARGE (Va.) (1775-1778) 299 (W. Hening, ed. 1821)	9
An Act to Restrict the Delegates of this Commonwealth in Congress from Engaging in Any Trade Either Foreign or Domestic, <i>reprinted</i> in 10 STATUTES AT LARGE (Va.) (1779-1781) 113 (W. Hening, ed. 1822)	11
An Act for Appointing Deputies from this Commonwealth to a Convention proposed to be Held in the City of Philadelphia in May Next, for the Purpose of Revising the Federal Constitution, <i>reprinted</i> in 12 STATUTES AT LARGE (Va.) (1785-1788) 256 (W. Hening, ed. 1823)	12

	<u>Page</u>
An Act for the Election of Representatives Pursuant to the Constitution of Government of the United States, <i>reprinted</i> in 12 STATUTES AT LARGE (Va.) (1785-1788) 653 (W. Hening, ed. 1823)	20
<i>Miscellaneous</i>	
U.S. Articles of Confederation, Article II	23
Article V, cl. 1	10
Article V, cl. 2	10
W.P. ADAMS, THE FIRST AMERICAN CONSTITUTIONS (1980)	8,9
3 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (1978)	11
8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (1978)	18,19
9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (1978)	17,18
2 ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1987)	18
5 ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1987)	13,14,15,28
THE FEDERALIST (H.C. Lodge, ed. 1889)	16,17
1 J.P. KAMINSKI and R. LEFFLER, FEDERALISTS AND ANTIFEDERALISTS (1989)	15,16

	<u>Page</u>
"Legal Qualifications of Representatives," 3 American Law Review 411 (1869)	20,21
Letter from Thomas Jefferson to Joseph C. Cabell (Jan. 31, 1814), <i>reprinted</i> in 2 P.B. KURLAND & R. LERNER, THE FOUNDERS' CONSTITUTION 81 (1987)	23,24
2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand, ed. 1911)	12
J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833)	24,25
C. WARREN, THE MAKING OF THE CONSTITUTION (1993)	27,28

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**On Writ Of Certiorari
To The Supreme Court Of Arkansas**

**BRIEF OF CITIZENS UNITED FOUNDATION AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

INTEREST OF AMICUS CURIAE

Citizens United Foundation is a nonprofit, nonpartisan, educational organization established to conduct research and to inform and educate the public on a variety of issues of national importance, including congressional reform and questions related to the original intent of the Founders and the correct interpretation of the United States Constitution. In the past, Citizens United Foundation has conducted research and published findings on other issues involving Constitutional interpretation, and its work includes having

filed *amicus curiae* briefs in federal district and appellate court litigation related to the constitutionality of the congressional ballot access law in the state of Washington.¹

The present consolidated action also concerns an effort by the people — in this case, the people of Arkansas — to regulate state and federal elections by restricting certain incumbents' access to the ballot. It can be viewed correctly as litigation by professional politicians against the people, exposing the adversarial relationship between entrenched incumbent legislators and American citizens.² The philosophical foundation for the people's attempt to rein in such politicians derives from the United States' divergence from a system of governance by citizen-legislators, as our Framers had intended, to rule by a professional class of politicians who are out of touch with the citizenry and often elected in politically-drawn districts so that they are able to obtain reelection, often for decades, and sometimes for life.

¹ Citizens United Foundation requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the various parties, have been submitted for filing to the Clerk of Court.

² Far from the example of citizen-legislators who serve their country out of a sense of duty and at considerable sacrifice, current congressional politicians often spend decades "on the Hill," with no visible means of support beyond the public till, losing contact with the problems and concerns of the citizens they rule over (rather than represent), while voting themselves a wide variety of benefits out of the public purse. The Congress, for example, has voted itself — and thereby endowed its members with — a host of perquisites of office, ranging from generous salaries and benefits to exemption from many laws. See *Spotlight on Congress, "Congressional Perks and Privileges"* (Free Congress Foundation, 1994) (reprinted as Appendix A hereto).

The legal question is whether the Constitution permits such action by U.S. citizens (in this case acting through referenda) in the several states, or whether the Constitution was drawn in such a way that it completely usurped from the people, in the several states, their power to determine the qualifications of those who will represent them and their states in Congress.

This brief of Citizens United Foundation examines in depth the historical/legal background of one of the critical issues presented in this case, underlying whether states have the power to add to the qualifications for congressional office enumerated in the Qualifications Clauses of the Constitution. This brief surveys and analyzes historical practices, laws, precedents and commentaries relating to the power of the states to impose eligibility requirements on congressional candidates. As a result, the underpinning for the petitioners' arguments that the people, and the several states, have such right and power is further strengthened. With respect, Citizens United Foundation believes that consideration of the information and analysis in its brief will be helpful for an informed adjudication of the constitutionality of the Arkansas congressional ballot access amendment in question.

SUMMARY OF ARGUMENT

The people of Arkansas have the power, pursuant to the Tenth Amendment, to enact a congressional ballot access law even if such a law is determined to add to the Constitution's enumerated qualifications for congressional office.

In analyzing the constitutionality of state efforts, such as the Arkansas ballot access amendment here in question, Citizens United Foundation has utilized the analysis in *Powell v. McCormack*, 395 U.S. 486 (1969), to identify the intent of

the Framers of the Constitution where, as here, the language of the Constitution does not explicitly resolve the question.

In *Powell*, this Court determined the Framers' intent by analyzing: (1) the practices and precedents prior to the federal convention of 1787; (2) the debates and commentaries of the federal convention and state ratification process; and (3) practices during the years following ratification of the Constitution. Utilization of the *Powell* methodology in this case reveals that the "Qualifications Clauses" (art. I, § 2, cl. 2 and art. I, § 3, cl. 3) of the U.S. Constitution prescribe minimal, rather than exclusive, qualifications for office. Since the Constitution does not divest the states of their historical power to require certain qualifications for congressional office, the states have the power under the Tenth Amendment to enact congressional ballot access laws.

The Supreme Court of Arkansas misapplied the *Powell* factors and misread the Framers' intent, applying an incorrect test of constitutionality. Proper construction of the Framers' intent confirms that the Constitution did not deprive the states of their historical power to supplement the requisites for congressional office explicitly enumerated in the Constitution. The Arkansas ballot access amendment at issue in this case, therefore, is a valid exercise of power retained by the citizens of Arkansas.

ARGUMENT

The majority opinion of the Supreme Court of Arkansas in *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 872 S.W. 2d 349 (1994), struck down the right of Americans to prescribe in their states reasonable conditions governing the election of their own congressional Representatives and Senators. In holding the Arkansas ballot access amendment

(which it determined would add requirements for Congressional office beyond those enumerated in the Constitution) unconstitutional, the Arkansas court misinterpreted the purport of the so-called Qualifications Clauses (art. I, § 2, cl. 2 and art. I, § 3, cl. 3),³ which set forth the minimum qualifications for congressional office, but do not limit states' power to add to those qualifications.

The citizens of Arkansas did not enact a law adding new required qualifications for those seeking congressional office. No one was disqualified from service in Congress under this enactment. The measure that was passed as a state constitutional amendment — and struck down by the Supreme Court of Arkansas as contrary to the U.S. Constitution — merely limited ballot access to certain Arkansas residents seeking election to the U.S. House of Representatives or the U.S. Senate who had previously served a specified number of terms in those offices. Such persons were not prevented either from running for re-election or from serving additional terms in office. Thus, whether such a limitation should even be considered a qualification for office, so as to supplement the requirements in the Qualifications Clauses of the U.S. Constitution, is doubtful. See *Storer v. Brown*, 415 U.S. 724 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971); see also *Clements v. Fashing* 457 U.S. 957 (1982).

Nevertheless, that threshold issue will undoubtedly be briefed in full by the petitioners, and is not analyzed here. Citizens United Foundation, as *amicus curiae*, has primarily

³ The cited clauses are commonly, albeit not officially, referred to as the Qualifications Clauses because they set forth certain prerequisites for holding congressional office. There are, of course, other "qualification" clauses in the Constitution. See U.S. Const., art. I, § 3, cl. 7; art. I, § 6, cl. 2; art. VI, cl. 3.

focused on the historical underpinning for the legal determination that Article I of the Constitution does not prohibit the states from adding qualifications for congressional office.

The framework for that analysis was furnished by this Court in *Powell v. McCormack*, 395 U.S. 486 (1969). In *Powell*, this Court, considering whether the Constitution limited Congress's ability to judge any qualifications of its members beyond those expressly prescribed by the Constitution, fashioned a three-factor review for determining the Framers' intent, where there was no conclusive answer in the text of the Constitution itself. While that analysis led the Court to rule in *Powell* that the Constitution limits congressional power to judge members' qualifications under Article I, § 5, the proper historical analysis in this case results in a very different finding. When the *Powell* analysis is properly applied to the Qualifications Clauses, it shows that the Constitution did not change the states' ability to supplement the minimum national qualifications for congressional office set forth expressly in the Constitution. The Constitution lists only minimum, not exclusive, qualifications for congressional office, reserving to the states the authority to prescribe additional qualifications for their respective congressional representatives.

I. UNDER *POWELL*'S THREE-FACTOR HISTORICAL ANALYSIS, THE STATES CLEARLY RETAINED THE AUTHORITY TO ADD TO THE CONGRESSIONAL QUALIFICATIONS SET FORTH IN THE CONSTITUTION

In *Powell v. McCormack*, *supra*, this Court overruled the House of Representatives's refusal to seat duly-elected Representative Adam Clayton Powell, Jr. (D.-N.Y.) in the 90th Congress. Relying on an in-depth analysis to identify the Framers' original intent, the Court concluded that

Congress lacks "authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution." *Id.* at 522. The question of Congress's authority in *Powell*, however, involved an interpretation of Article I, § 5, cl. 1 of the Constitution. The relevant question in this case involves the scope of the two Qualifications Clauses (art. I, § 2, cl. 2 and art. I, § 3, cl. 3) of the Constitution.

In the case now before this Court, the Supreme Court of Arkansas purported to look to *Powell* for guidance, but failed to conduct properly the *Powell* analysis. The resulting flawed analysis led that court to conclude that states are prohibited from adding to the constitutionally-enumerated requisites for congressional office. *Hill, supra*, 872 S.W.2d at 355-57. By contrast, proper application of *Powell*'s three-factor analysis demonstrates that the Framers intended no such restriction on the powers of the states and the people.

In *Powell*, this Court determined the Framers' intent by looking to the following three factors: (1) the practices and precedents predating the federal convention of 1787, 395 U.S. at 522-532; (2) the debates and commentaries of the federal convention and state ratification process, 395 U.S. at 533-541; and (3) the legislature's own understanding, as manifested by its practices in the years following ratification of the Constitution, 395 U.S. at 541-47. Consideration of those same three guideposts in this case provides the proper historical perspective for discerning the Framers' intent and demonstrates that the Constitution was drafted so as to leave to the states their pre-existing power to add to the enumerated qualifications for congressional office.

A. COLONIAL AND PRE-FEDERAL CONVENTION PRECEDENTS ESTABLISH THAT THE AUTHORITY TO PRESCRIBE QUALIFICATIONS FOR CONGRESSIONAL OFFICE WAS AMONG THE SOVEREIGN POWERS HISTORICALLY VESTED IN THE STATES

To determine the "historical context" in which the Convention debates concerning expulsion of legislators took place, the *Powell* Court looked to the 16th, 17th, and 18th century practices of the English Parliament, and dealt at length with the case of the expulsion of John Wilkes from the House of Commons, as well as Wilkes' reinstatement in 1782. 395 U.S. at 522-531. Concluding that the precedents regarding expulsion were inconclusive, this Court noted that Wilkes' struggle and ultimate victory nevertheless "had a significant impact on the American colonies" (395 U.S. at 530) just prior to the Constitutional Convention in 1787.

In the case now before this Court, while no Wilkes-like English precedent appears to exist, the colonial and pre-convention practices of the original 13 states provide significant insight into the "historical context" in which the debates over the Qualifications Clauses took place. These practices confirm that the authority to establish qualifications for representatives to the national legislature was within the sovereign powers historically exercised by the several states.

1. Colonial America

In colonial America, there was no uniformity in the method used to appoint delegates to the First Continental Congress. The qualifications and procedure for the selection were left to the individual states. In Connecticut, Massachusetts, Pennsylvania and Rhode Island, for example, delegates were selected by the state legislature. See W.P. ADAMS,

THE FIRST AMERICAN CONSTITUTIONS 39 (1980). South Carolina's five delegates were chosen by a general meeting of 104 "free white men" from throughout the state. *Id.* New York selected its representatives by a combination of direct voting and county committees. *Id.* In the other eight states, delegates were appointed by citizen conventions. *Id.*

During the period between the formal break with the British Crown and adoption of the Articles of Confederation, the states continued to establish their own qualifications and procedures for selecting delegates to the Continental Congress. In Virginia, the General Assembly passed one of the new nation's first term limits statutes, restricting its delegates to serving three successive years. 9 STATUTES AT LARGE (Va.) at 299 (W. Hening, ed.). Shortly thereafter, the limitation was amended to read "three years, in any term of six years." *Id.* at 888. Maryland and Pennsylvania adopted constitutional provisions regulating the qualifications of their respective congressional delegates. In Maryland, delegates were required to be over the age of 21, a resident of the state for five years and the owner of real and personal property with a value of at least "one thousand pounds current money." Md. Const. of 1776, art. XXVII, reprinted in 3 FEDERAL AND STATE CONSTITUTIONS (F. Thorpe, ed.) 1695-96. Pennsylvania's constitution imposed term limits and barred persons holding "any office in the gift of the congress" from representing the state in Congress. Pa. Const. of 1776, § 11, reprinted in 5 FEDERAL AND STATE CONSTITUTIONS 3085.

As the charters and laws of the original colonies illustrate, the states initially held and exercised the prerogative to establish qualifications and procedures for electing representatives to the First and Second Continental Congresses.

2. The Articles of Confederation

Neither the Constitution nor the Articles of Confederation explicitly address whether the states retained their original authority to determine the qualifications for their congressional representatives. Moreover, the Articles of Confederation contained provisions comparable to the Constitution's "times, places and manner" clause (art. I, § 4, cl. 1) and Qualifications Clauses (art. I, § 2, cl. 2, and art. I, § 3, cl. 3). Since, under the Articles of Confederation, the states clearly exercised the authority to prescribe the qualifications of their own congressional delegates, the similarities between the language of the Articles of Confederation and that of the Constitution are significant.

The Articles provided that congressional delegates "shall be annually appointed in such manner as the legislature of each state shall direct." Art. of Conf., art. V, cl. 1. This clause is similar to the Constitution's "times, places and manner" clause, and confirmed the states' power to set forth the "manner" in which congressional delegates were to be chosen. The Articles further provided that "no person shall be capable of being a delegate for more than three years in any term of six years." *Id.*, art. V, cl. 2. By restricting the time that an individual delegate could serve in Congress within a particular period, the clause set forth a uniform, national qualification for that office. Thus, the clause was a precursor of the Constitution's Qualifications Clauses.⁴

⁴ The absence of a national term limit in the Constitution, in contrast to the Articles of Confederation, is neither evidence of a proscription against limitations on terms in office nor on ballot access. It is rather evidence that the right to impose such limitations was left to the states.

Such provisions in the Articles of Confederation clearly did not deprive the states of their authority to set forth additional qualifications for congressional office. In practice, New Hampshire's constitution required congressional delegates to meet the requirements set forth for the state's chief executive. N.H. Const. of 1784, reprinted in 4 *FEDERAL AND STATE CONSTITUTIONS* 2467. These requisites included: seven years inhabitancy in the state; being at least thirty years of age; having an estate worth at least "five hundred pounds," at least one-half of which consisted of a freehold in land; and being of the Protestant religion. *Id.* at 2462-63. Other state laws also imposed requirements for congressional office beyond those set forth in the Articles of Confederation. The Virginia legislature restricted the eligibility of its congressional delegates by requiring them to take the following oath:

I am not directly or indirectly engaged in any merchandize, either foreign or domestic, except for commodities of my own growth or manufacture; and that I will not engage in any such merchandize so long as I continue a delegate in congress. [10 *STATUTES AT LARGE* (Va.) at 113.]

Reportedly, the first recorded act of the Connecticut legislature during its spring 1784 session was passage of a law prohibiting superior court judges from serving in either the legislature or Congress. See 3 *DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 321 (1978).

3. Appointment to the Federal Convention

The states also regulated the appointment of delegates to the Federal Convention of 1787. Virginia was typical. On

October 16, 1786, the General Assembly passed "An Act for Appointing Deputies from this Commonwealth to a Convention Proposed to be held in the City of Philadelphia in May next, for the Purpose of Revising the Federal Constitution." The statute provided for the appointment of seven "commissioners" by a joint ballot of both houses of the legislature. These commissioners were "authorized as deputies from this commonwealth" to meet with the delegates of the other states at the Philadelphia convention where the Constitution was drafted. 12 STATUTES AT LARGE (Va.) at 256.

B. THE DEBATES OF THE FEDERAL CONSTITUTIONAL CONVENTION, AS WELL AS THE DEBATES AND COMMENTARIES DURING THE STATE RATIFICATION PROCESS, DOCUMENT THAT THE FRAMERS DID NOT INTEND FOR THE QUALIFICATIONS CLAUSES TO BE ABSOLUTE

1. Debates of the Federal Convention

There is no record that the question whether to impose exclusive national qualifications for congressional office was discussed at the Constitutional Convention. Indeed, there seems to have been an understanding, consistent with the historical practices referenced above, that the states would be free to establish supplemental requirements for their own congressional delegates.⁵

⁵ There is evidence, by comparing earlier drafts of the Qualifications Clauses with those that were actually adopted, that the notion of an exclusive set of national qualifications for congressional office was rejected early by the Committee of Detail. See THE RECORDS OF THE FEDERAL CONVENTION OF 1787 137 n.6, 139, 178 (M. Farrand, ed.).

On the other hand, there was heated debate over minimum national qualifications for congressional office. When George Mason of Virginia moved to require a minimum age of 25 years for election to the House of Representatives, the debate focused on whether there should be any nationwide minimum age at all. Mason characterized it as "absurd" to allow someone who was not yet old enough to enter into a binding contract to "manage the affairs of a great nation." 5 ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 228 (1987). James Wilson of Pennsylvania, however, spoke against any age restriction, saying, "The motion tended to damp the efforts of genius, and of laudable ambition. There was no more reason for incapacitating youth than age, when the requisite qualifications were found." *Id.* at 228-29.

There was also intense debate over whether or not aliens and naturalized citizens would be eligible for election to either house of Congress, and if so, under what conditions. Mason favored allowing immigrants to serve in the House, but was against allowing "foreigners and adventurers" to make laws governing the nation. Fearing that a foreign power such as Britain "might send over her tools who might bribe their way into the Legislature for insidious purposes," Mason suggested a minimum of seven years of U.S. citizenship as a qualification for the House. *Id.* at 389. Gouverneur Morris of Pennsylvania opposed any citizenship or residency requirements, arguing that nothing more than a freehold should be required for election to the House. *Id.* John Rutledge of South Carolina sought a requirement of seven years' residency in the state. *Id.* Alexander Hamilton of New York and James Madison of Virginia believed that the Constitution should "require merely Citizenship & inhabitancy." *Id.* at 411.

Debate over the citizenship and residency requirements for the Senate followed a similar path. Gouverneur Morris moved to substitute a 14-year U.S. citizenship requirement for the four-year requirement in the original draft. He argued that it would be too dangerous to admit strangers into the Senate. *Id.* at 398. James Madison spoke against the amendment, calling it "unnecessary and improper." He said Congress was authorized to regulate naturalization and thus the issue could be resolved short of a constitutional provision. *Id.* Benjamin Franklin of Pennsylvania favored a "reasonable time," while Edmund Randolph of Virginia felt that a fourteen-year disqualification of naturalized citizens was too long. *Id.* at 399. The delegates settled on a nationwide nine-year citizenship requirement for election to the Senate. U.S. Const., art. I, § 3, cl. 3.

While the above contributions to the debate at the Constitutional Convention reflect the view that there should be some national set of minimum qualifications for congressional office, nothing therein suggests that the states would be divested of their historical authority to supplement such qualifications with additional requirements.⁶ While the

⁶ Despite extensive debate over the Qualifications Clauses, Madison's notes reveal only two references to delegates expressing the view that the enumerated qualifications would be in any way exclusive. As this Court acknowledged in *Powell*, in each instance, the remarks focused on the ability of Congress, not the states, to enact further qualifications. 395 U.S. at 534.

The first remarks occurred when John Dickinson of Delaware opined that "any recital of qualifications in the Constitution...would by implication tie up the hand of the Legislature from supplying the omissions." 5 DEBATES at 371. As this Court recognized in *Powell*, Dickinson's reference to "the Legislature" referred to Congress, not the state legislatures. 395 U.S. at 532-33. Thus, his comment cannot be
(continued...)

Framers rejected a proposal to vest Congress with authority to enact further restrictions, the evidence suggests that the Framers never intended to restrict the states in this area.

2. The State Ratification Debates and Commentaries

The dominant concern of the ratification debates centered on anti-Federalist accusations that the new Constitution would result in a federal power-grab. Federalists answered those accusations by assuring wary citizens that no such result would occur. Debate over the Qualifications Clauses had a similar tenor. When examined in the context of the overall ratification debates, the debate on the Qualifications Clauses reinforces the view that states retain the power to add to the federally-mandated minimum qualifications for election to Congress.

On October 18, 1787, the New York Journal published the first of sixteen anti-federalist essays by "Brutus." The essay predicted that the new government would "possess absolute and uncontrollable power." 1 J.P. KAMINSKI and R. LEFFLER, *FEDERALISTS AND ANTIFEDERALISTS* 6 (1989).

⁶(...continued)

construed as a suggestion to limit the power of states. The second instance occurred during consideration of a proposal by the Committee of Detail to grant Congress the authority to enact land ownership qualifications for its members. James Madison spoke against this proposal, saying it vested "an improper & dangerous power in the Legislature." 5 DEBATES at 404. Like Dickinson's earlier comments, Madison was addressing "the delegation to the Congress of the discretionary power to establish any qualifications." *Powell*, 395 U.S. at 534 (emphasis added). His remarks did not address the authority of the states to enact additional qualifications for office.

Nine days later, an essay by "An Old Whig" printed in the Philadelphia Independent Gazetteer, argued that the new federal constitution would largely destroy the separate governments of the several states. *Id.* at 18. Federalists rebutted these charges by assuring that the new government would have limited powers. They promised that authority traditionally exercised by the states, and not delegated to the federal government, would remain vested in the states. For example, in THE FEDERALIST No. 39, James Madison wrote that the jurisdiction of the "proposed Government...extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." THE FEDERALIST 238 (H.C. Lodge, ed. 1889).

Historical documents reflect vigorous discussion of the Qualifications Clauses in only a handful of the original 13 states. Like the debates in the Constitutional Convention, these state debates focused on the appropriate level of federal regulation of congressional elections. Supporters of the Constitution emphasized the need for a national standard of minimum qualifications. They opposed nationally-mandated land ownership requirements and age caps. Contrary to the contentions of those who would oppose state limited ballot access measures, the record does not suggest that Federalists believed the Constitution stripped the states of their historical power to enact their own standards for congressional office.

Although certain isolated statements of James Madison and Alexander Hamilton may appear to be contrary, their works do not support the argument that the Constitution divested the states of their historical power to regulate the qualifications of representatives in the House and Senate. When the writings of these two statesmen, as they relate to the Qualifications Clauses, are read in context, it becomes clear that the limitations they address apply exclusively to

the powers of Congress and the federal government, and not the powers of the states. For example, in THE FEDERALIST No. 60, Hamilton wrote: "[t]he qualifications of the persons who may choose or be chosen...are defined and fixed by the Constitution, and are unalterable by the legislature." THE FEDERALIST 379 (H.C. Lodge, ed.). As this Court pointed out in *Powell*, Hamilton's reference to "the legislature" was a comment on the powers of Congress. 395 U.S. at 539-40. At the start of THE FEDERALIST Number 60, Hamilton explained that his purpose was to demonstrate "the danger ...from [allowing Congress] this ultimate right of regulating its own election." THE FEDERALIST 373-74.

Of similar purport is Madison's comment in THE FEDERALIST No. 52, where he says that the qualifications of the elected — being "more susceptible of uniformity" than as defined in state constitutions — "have been very properly considered and regulated by the convention." *Id.* at 328. This Court in *Powell* referred to this comment as indicative of Hamilton's view that Congress was without the power to add to the constitutionally-enumerated congressional qualifications. 395 U.S. at 340. That is in no way inconsistent with the view that the Qualifications Clauses contain only minimum standards for congressional office. Madison's essay acknowledges that several state constitutions had already set forth their own requisites for congressional office; nowhere does he say these state-imposed requisites would be invalidated to the extent that they supplement the Constitution's requirements.

The Constitutional ratification debates in Virginia, Massachusetts, and other states fail to support a claim that the Constitution defined the exclusive qualifications for congressional office. In Virginia, Delegate Wilson Nicholas observed that the proposed constitution wisely "required"

only the qualifications of age and residence, and that land ownership should not be an additional requirement. "Debates of the Virginia Ratifying Convention," reprinted in 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 918-19 (1990).

At the Massachusetts convention, Rufus King — a delegate to the Constitutional Convention in Philadelphia — responded to proponents of a national age limitation and a federal requirement of land ownership for candidates to the House of Representatives. King pointed out that the Articles of Confederation did not require land ownership for serving in Congress, and suggested that a national age cap would not work, because "[w]hat in the Southern States would be accounted long life, would be but the meridian in the Northern; what here is the time of ripened judgment is old age there. Therefore the want of such a disqualification cannot be made an objection to the Constitution." 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION at 36 (emphasis in original).

Both the Virginia and the Massachusetts debate focused on federal requirements for election to Congress. These debates do not indicate that the Constitution prevents states from supplementing such requirements. Instead, King's discussion of the effect of climate on longevity and his comparison of the Constitution's Qualifications Clauses and the Articles of Confederation suggest that the individual states might consider land ownership and age caps based on regional differences, instead of mandating national qualifications.

On October 24, 1788, the fourth in a series of pro-ratification essays by "An American Citizen" appeared in Philadelphia's Independent Gazetteer. The article described in detail the constitutional provisions for the "safety and

happiness of the people." 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 431 (1978). Discussing the qualifications for congressional office, the essay stated that no qualification in monied or landed property "is required by the proposed plan." *Id.* at 432. Like other commentaries on the Qualifications Clauses, "An American Citizen IV" focused on the limits of federally-mandated qualifications for federal office, and recognized that the federal government would not be permitted to impose requirements of property, wealth, and birthright for election to the House, Senate or presidency. But the essay in no way suggested that individual states would be stripped of their historical authority to impose such restrictions on their congressional representatives.

Throughout the ratification process, the focus of the debates and commentaries on the Qualifications Clauses was on how far the federal government should go in setting forth uniform minimum standards for election to the House and Senate. Delegates and commentators were not concerned about additional requirements the states might impose. When viewed in the context of the general tenor of debate over ratification of the Constitution, the discussions surrounding the Qualifications Clauses reinforce the view that the states retained the authority to add to the constitutionally-prescribed requirements for congressional office.

C. THE POST-RATIFICATION PRACTICES OF THE STATES FURTHER REINFORCE THE VIEW THAT THE STATES RETAINED THE AUTHORITY TO ADD TO THE REQUISITES FOR CONGRESSIONAL OFFICE ENUMERATED IN THE CONSTITUTION

In *Powell*, this Court looked to Congress's early interpretation of its powers under art. I, § 5, to help determine the

Framers' intent, and noted that its efforts to exclude members on the basis of qualifications not expressly prescribed in the Constitution were both late and inconsistent. 395 U.S. at 543-46. As a result, the Court concluded that Congress's early understanding of its powers "confirms our conclusion that the House is without power to exclude any member-elect who meets the Constitution's requirements for membership." *Id.* at 547. In sharp contrast to the history of Congress's early post-ratification practices relating to exclusion of congressional members-elect, the states supplemented the qualifications for congressional office enumerated in the Constitution immediately after the Constitution was ratified.

On November 20, 1788, the Virginia General Assembly passed "An Act for the election of Representatives Pursuant to the Constitution of Government of the United States." The law required representatives to live in their respective congressional districts, and further mandated that they be land owners. 12 STATUTES AT LARGE (Va.) at 653. In 1790, a Maryland statute divided the state into six congressional districts and required candidates for the House to reside in their respective districts for at least twelve months prior to their election. See *Hellmann v. Collier*, 217 Md. 93, 141 A.2d 908 (1958) (citing Ch. XVI, Acts of 1790). By the mid-1800s, the legislatures of at least nine states had enacted requisites for congressional office beyond those enumerated in the Qualifications Clauses. Of the original 13 states, Connecticut, Georgia and Massachusetts joined Maryland and Virginia in requiring candidates for the House to live in their respective congressional districts. See "Legal Qualifications of Representatives," 3 American L. Rev. 411 (1869). The 14th state to join the United States (Vermont) enacted a similar restriction. *Id.* New York and Tennessee prohibited members of their legislature from being elected to the U.S. Senate. *Id.* And Illinois barred its Supreme Court

and Circuit Court judges from seeking election to either the House or Senate. *Id.*

Unlike Congress's early post-ratification practices regarding exclusion of its members — which, when analyzed by this Court in *Powell*, led to the conclusion that Congress lacked such authority — the imposition of additional qualifications upon congressional candidates by the states reinforces the view that the states retained the historical power to add to the requirements for congressional office enumerated in the Constitution.⁷

⁷ Several state and lower federal courts have struck down state laws deemed to add to the qualifications for congressional office enumerated in the Constitution, *See, e.g., Dillon v. Fiorina*, 340 F.Supp. 729 (D. New Mex. 1972); *Stack v. Adams*, 315 F.Supp. 1295 (N.D. Fla. 1970); *Stockton v. McFarland*, 56 Ariz. 138, 106 P.2d 328 (Ariz. 1940); *State ex rel. Chandler v. Howell*, 104 Wash. 99, 175 P. 569 (1918). Nevertheless, certain of these opinions which invalidated "resign-to-run" state statutes may no longer be good precedent in view of this Court's decision in *Clements v. Fashing*, 457 U.S. 957 (1982). Furthermore, most of these holdings antedate the formulation this Court established in *Powell* to scrutinize post-ratification actions as a means to determine original intent. The *Powell* Court looked to Congress's early interpretation of its own powers, not the lower federal courts' interpretation of these powers. The relevant focus here, therefore, would be on the actions by state legislatures reflecting the several states' early interpretation of their reserved powers.

D. APPLICATION OF POWELL'S THREE-FACTOR ANALYSIS CONVINCINGLY SUPPORTS THE POWER AND RIGHT OF RESIDENTS OF THE SEVERAL STATES TO PRESCRIBE QUALIFICATIONS FOR CONGRESSIONAL OFFICE

In *Powell*, each of the Court's three factors for measuring the Framers' intent supported the view that Congress lacked the power under review, *i.e.*, to exclude a duly-elected member. As indicated above, however, examination of each of the Powell factors in this case demonstrates that the states indeed possess the power at issue in this case (*i.e.*, to add to the minimum standards for congressional office set forth in the Constitution). The combined effect of the pre-federal convention practices of the states, the debates over the adoption and ratification of the Constitution, and the post-ratification practices of the states, reveals convincingly that the Framers did not intend to strip the states of their historical power to enact qualifications for congressional office beyond those enumerated in the Constitution. If they had so intended, the Constitution presumably would have said so. Additionally, such a dramatic change from pre-constitutional practice could have been expected to spark enormous debate. But, as indicated above, there appears to have been no such debate. Such silence is deafening in the case of such an important right, and is further confirmation that the states were understood to have retained their rights to prescribe qualifications for their own congressional representatives.

II. THE TENTH AMENDMENT CONFIRMS STATE POWER TO ENACT CONGRESSIONAL BALLOT ACCESS LIMITATION LAWS

As mentioned in section I.A.2. of this brief, the Articles of Confederation, like the Constitution, contain no language

specifically bestowing upon the states the authority to enact qualifications for their congressional representatives. Article II of the Articles of Confederation, however, expressly confirmed that the states retained the exercise of their historical powers "not expressly delegated to the United States." The Tenth Amendment also confirms and guarantees to the several states all reserved powers "not delegated to the United States...nor prohibited...to the States."

The word "expressly" was omitted from the Tenth Amendment to ensure that the federal government could exercise implied powers as well as expressly delegated powers. Nevertheless, except where specifically limited by the Constitution, the states retained the same rights and powers pursuant to the Tenth Amendment that they held under the Articles of Confederation. From the perspective of Tenth Amendment analysis, therefore, the debate over the constitutionality of state-imposed ballot access limitations on congressional office-seekers turns on whether the Qualifications Clauses divest the states of their historical power to prescribe requisites for congressional office. On this point, President Thomas Jefferson and Justice Joseph Story sharply disagreed. President Jefferson wrote:

Had the constitution been silent, nobody can doubt but that the right to prescribe all the qualifications and disqualifications of those they would send to represent them, would have belonged to the State. So also the constitution might have prescribed the whole, and excluded all others. It seems to have preferred the middle way. It has exercised the power in part, by declaring some disqualifications, to wit, those of not being twenty-five years of age, of not having been a citizen seven years,

and of not being an inhabitant of the State at the time of election. But it does not declare, itself, that the member shall not be a lunatic, a pauper, a convict of treason, of murder, of felony, or other infamous crime, or a non-resident of his district; nor does it prohibit to the State the power of declaring these, or any other disqualifications which its particular circumstances may call for; and these may be different in different States. Of course, then, by the tenth amendment, the power is reserved to the States. [Letter from Thomas Jefferson To Joseph C. Cabell (Jan. 31, 1814), *reprinted* in 2 P.B. KURLAND & R. LERNER, *THE FOUNDERS' CONSTITUTION* 81 (1987) (emphasis added).]

In discussing the qualifications of members of the House of Representatives, Justice Story took the position that since the office of Representative was a creature of the Constitution, the states have no authority to add to the enumerated qualifications, because there was no specific grant of the power to do so in the Constitution. 2 STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 626. Justice Story also expressed fear that recognizing a state power to enact congressional qualifications would give the states the power to subvert the Constitution. He worried that "[a] state may, with the sole object of dissolving the Union, create qualifications so high, and so singular, that it shall be impracticable to elect any representative." *Id.* at § 623.

There are at least three flaws in Justice Story's argument. First, as the analysis in part I of this brief demonstrates, Justice Story's position is inconsistent with the Framers' original intent. The *Powell* analysis leads to strong evidence

that the states always held the authority to define the qualifications of their representatives to the national legislature, and that the Framers never acted to strip the states of this historical sovereign power. Second, Justice Story's argument is inconsistent with his own theory regarding the powers of the states under the Tenth Amendment. In his Tenth Amendment analysis, he stressed that the Constitution is "an instrument of limited and enumerated powers...what is not conferred, is withheld, and belongs to the state authorities." 3 STORY, *COMMENTARIES* § 1900. On the question of qualifications for congressional office, however, he ignores the states' historical practices and asserts that the power to define requisites for congressional office should not exist unless the governing compact specifically delegates this power to the states. Presumably, if that view were correct, the states also would have been powerless to enact qualifications for their congressional representatives under the Articles of Confederation. Yet no one disputes that the states had such power under the Articles of Confederation. Third, recognizing a state power to enact additional qualifications for congressional office does not give the states the power to subvert the Constitution.⁸ If a state were to pass such a measure, the Supremacy Clause makes it clear that such a law would be unconstitutional. U.S. Const., art. VI, cl. 2. And the power of the federal courts to overturn an unconstitutional law is well established. U.S. Const. art. III,

⁸ It must be pointed out that nothing in the Arkansas ballot access amendment could be construed as subverting the Constitution. That state constitutional law would merely block ballot access to congressional incumbents who had served a specified number of terms. It does not "create qualifications so high, and so singular, that it shall become impracticable to elect any representative." 3 STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 623. The Arkansas ballot access amendment entails none of the mischief cited by Justice Story as endangering the survival of the Union.

§ 2; see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405-409 (1819).

President Jefferson's above-quoted analysis that states had the authority to supplement the qualifications for congressional office is consistent with the original intent of the Framers as determined by the *Powell* analysis. It also offers a logically consistent comparison between the powers of the states under the Constitution and those under the Articles of Confederation. When the relevant factors are considered and properly weighed, it is evident that, under the Constitution, the states retained their historical power to supplement the qualifications for congressional office enumerated in the Constitution. Hence, even if the Arkansas ballot access amendment is found to add to the qualifications for congressional office listed in the Constitution, it is a valid exercise of Arkansas' power under the Tenth Amendment.

III. THE SUPREME COURT OF ARKANSAS MISREAD THE ORIGINAL INTENT OF THE FRAMERS, MISCONSTRUED *POWELL* AND IMPROPERLY ANALYZED THE POWERS OF THE STATES UNDER THE TENTH AMENDMENT

While the majority opinion of the Supreme Court of Arkansas below paid lip service to the *Powell* analysis, the decision misconstrues or ignores the relevant authorities, and appears to totally misread the Framers' original intent.⁹

⁹ A federal district court that recently struck down Washington State's congressional ballot access statute made similar errors. For example, that court, in reaching its conclusions, misread Hamilton's statement in *The Federalist* No. 60 and mistakenly looked to Congress's early actions or opinions as evidence on the question rather than to the states' own early interpretation of their individual powers. See *Thorsted v. Gregoire*, 841 F.Supp. 1068, 1076 (W.D. Wash. 1994). As of the (continued...)

A. THE ARKANSAS COURT MISCONSTRUED SEVERAL IMPORTANT AUTHORITIES

In its analysis of the Qualifications Clauses, the Supreme Court of Arkansas, in *U.S. Term Limits, Inc. v. Hill*, *supra*, acknowledged that the states had the authority under the Articles of Confederation to establish qualifications for their congressional representatives. 872 S.W.2d at 356. That acknowledgment, however, is followed by the following statement, indicating a narrow view of the powers of the states and the people: "[t]he framers of the U.S. Constitution did not expressly endow the states with this same authority." *Id.* But the states may properly continue to exercise such authority without an express grant by the Constitution. The states retain this power pursuant to the Tenth Amendment. As Justice Hays succinctly explained in his dissent in *U.S. Term Limits, Inc. v. Hill*, *supra*:

The people of each state possess all powers which are not expressly or impliedly delegated to the federal government or which they are not prohibited from exercising by the United States Constitution. [*Id.* at 46 (Hays, J., dissenting).]

The majority of the Arkansas Court also cited Charles Warren's *THE MAKING OF THE CONSTITUTION* for the proposition that the federal convention of 1787 "defeated a proposal for the states to set property qualifications for service in Congress." 872 S.W.2d at 356. This assertion is in error. The authorities, including Warren's book, clearly

⁹(...continued)

writing of this brief, a review of the District Court's opinion was pending, *sub nom. Thorsted v. Munro*, before the U.S. Court of Appeals for the Ninth Circuit (Nos. 94-35222 and 94-35223).

state that the federal convention of 1787 considered and defeated a proposal authorizing Congress to legislate a uniform property ownership requirement for election to the House and Senate. *THE MAKING OF THE CONSTITUTION* 416-419 (1993). See also 5 *DEBATES* 402-04. This *amicus* is unaware of anything in the records of the federal convention suggesting that the Framers considered, much less defeated, a proposal of the nature claimed by the majority opinion in *U.S. Term Limits, Inc. v. Hill*.¹⁰

The imprecise nature of the Arkansas Court's analysis is further demonstrated by its mischaracterization of Alexander Hamilton's statement that the "legislature" has no authority to alter the qualifications set forth in the Constitution. While the Supreme Court of Arkansas properly concedes that this comment was directed at the powers of Congress and not the states, it nonetheless asserts that Hamilton's "allusion to the fixed and immutable character of the enumerated qualifications" evidences an unstated desire on the part of the Framers to strip the states of this power too. 872 S.W.2d at 356. But that statement ignores historical fact. Hamilton's introductory comments state outright that he is discussing the danger of giving Congress unfettered power to regulate its own membership. *See supra*, pp. 16-17. There is nothing in the context of Hamilton's statement to support the Arkansas Court's inference of a secret agenda designed to strip the

¹⁰ Since the states at the time of the convention already exercised, as part of their historical sovereign powers, the authority to set forth their own requisites for their congressional representatives, a proposal of the nature suggested by the Arkansas court would have been unnecessary. On the other hand, if the Framers desired to divest the states of this historical authority, one would have expected a proposal, debate and an affirmative vote accomplishing that end. Of course, there is nothing in the record that would suggest that this latter series of events occurred.

states of their historical power to prescribe qualifications for congressional office.

B. IMPORTANT AUTHORITIES WERE IGNORED BY THE SUPREME COURT OF ARKANSAS

The Supreme Court of Arkansas made no mention of the early post-ratification practices of the states. Instead, the court focused only on Congress's view of the powers of the states in the early post-ratification years. Congress's view of the states' powers is not the critical factor under the *Powell* analysis; it is the states' view of their own powers that is important. As detailed above, the states have long perceived their powers as including the power to add to the enumerated qualifications for congressional office. *See supra*, pp. 19-21. The Arkansas decision also fails to analyze the overall tenor of the ratification debates. Throughout the process, Federalists repeatedly assured the citizenry that the federal government was one of limited powers. The states were to retain the powers that they traditionally held, except where specifically divested of a particular power by the Constitution. *See supra*, pp. 22-26. There is nothing in the Constitution specifically divesting the states of their historical authority to add to the requirements for congressional office enumerated in the Qualifications Clauses of the Constitution, but the majority below nevertheless determined that such authority no longer exists.

C. THE SUPREME COURT OF ARKANSAS MISJUDGED THE FRAMERS' INTENT

The majority opinion of the Supreme Court of Arkansas claims to give effect to the Framers' original intent, but as explained above and in the dissent of Justice Hays, 872 S.W.2d at 367-68, the majority's analysis is seriously

flawed. *Powell's* three-factor analysis demonstrates that the Framers did not intend to divest the states of their historical sovereign power to add to the requisites for congressional office enumerated in the Constitution. To give effect to the Framers' intent, the holding of the Supreme Court of Arkansas should be reversed.

CONCLUSION

For the reasons set forth above, Citizens United Foundation respectfully requests this Court to reverse the decision of the Supreme Court of Arkansas as to the constitutionality of Arkansas' congressional ballot access amendment, and to uphold the constitutionality of that amendment.

Respectfully Submitted,

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August 16, 1994

APPENDIX

APPENDIX A

CONGRESSIONAL PERKS AND PRIVILEGES

[© 1994 Free Congress Foundation, 717 Second Street, N.E., Washington, D.C. 20002, "Spotlight on Congress." (Reprinted with permission.)]

The following is a list of what taxpayers give congressmen for serving in office:

1. Salary — \$133,600
2. Lucrative health benefits, with approximately two-thirds paid by taxpayers.
3. Life insurance worth \$136,000. Fifty percent of premiums paid by taxpayers.
4. Very generous retirement plan — Congressmen pay 7.5 percent of salary. May receive benefits at age 50 with 20 years of service, or at age 60 with 10 years of service. Average benefits collected are \$730,635, about three times average private benefits. A congressman leaving office in 1992 after 12 years of service receives almost \$50,000 per year. This is in addition to Social Security, military pensions, or any other private pension program. Even congressmen who are convicted felons may still receive their retirement.
5. Eligible for workman's compensation, unemployment, and survivor benefits.
6. Taxpayer-subsidized day care facility.
7. Health services, including 24-hour medical staff on call in Capitol, ambulance restricted to

congressmen, annual physical exam, complete laboratory, x-ray, pharmacy and physiotherapy services, electro-cardiographic services, immunization and allergy injections for congressmen and staff, consultations and hospitalization at subsidized rates. (Annual fee charged for non-emergency services.)

8. Health facilities, including gymnasium, swimming pool, paddleball, steamroom, etc. Available for cheap annual fee.
9. Congressional license tags, which then assure freedom to violate most Washington parking laws with impunity.
10. Allowed to receive gifts up to \$200 value from foreign governments.
11. Travel mileage to and from sessions of Congress reimbursed by taxpayers at 27 cents per mile.
12. Twenty-two paid staff members.
13. Barber and beauty shops.
14. Check-cashing privileges at House bank.
15. Free picture framing for office displays (which they later take home).
16. Free plants for office decoration. (Many of these also find their way home). Potted palms can be borrowed and floral centerpieces obtained free for "official functions."

17. Free maps of all kinds (nautical, aeronautical, geological, relief, etc.) are available from government sources.
18. Two framed reproductions of paintings and prints are available on loan for office display.
19. Meeting rooms of all sizes can be reserved for private use.
20. Free photographic services, including portraits, candids, news, and slides for television use. Developing and printing services are heavily subsidized.
21. Heavily subsidized printing services, mostly paid from official expense account.
22. Free collating, stapling, inserting, and other bindery services.
23. Free package wrapping.
24. Free pickup and delivery service for bindery projects.
25. Fifty free file boxes per session. Many of these are taken by the staff to facilitate moving day at home.
26. Free publications, including 2500 official House Calendars, hardcover agricultural yearbooks, 20,000 consumer information pamphlets, and a book containing the public speeches of all the presidents.

27. State of the art recording facilities available at very nominal cost, to be paid from congressman's official expense account. Services include production of radio and television programs; same day duplicates; extensive editing.
28. Free mail. Known as the frank, these privileges include:
 - A postage expense account equal to three mailings per year to EVERY household in the district at First Class rate. In addition, congressman is allowed to transfer up to \$25,000 from other accounts into the franking account. Charges against franking account include all general correspondence and special mailings, such as newsletters.
 - Newsletters may:
 - contain two sheets of 11.5" x 17".
 - include two pictures of congressman per page, up to 20 percent of page.
 - display congressman's name an average of eight times per page (in addition to several "exceptions").
 - display congressman's voting record (using congressman's description of vote).
 - include "issue surveys," which are then valuable for targeted courting of individuals and groups through careful list development.
29. Free surplus books are available from the Library of Congress for congressmen to donate to local

- libraries and others. (It makes for good local press!)
30. Free seeds and agricultural reports through franked mail, EVEN DURING THE 90 DAY PERIOD FOLLOWING THE EXPIRATION OF THEIR TERMS IN OFFICE.
31. Annual "official expense account" of \$225,389, which covers travel expenses, office supplies, office equipment, and even furniture FOR THE DISTRICT OFFICES. Annual "clerk-hire account" of \$557,400 to pay for twenty-two staff members.
32. Congressmen elected before 1980 and retired in 1992 were allowed to keep leftover campaign funds for themselves. Up to \$40 million could have been pocketed in this deal.
33. Long-distance telephone privileges, paid for from clerk-hire account.
34. Heavily-subsidized dining facilities. Until recently, congressmen were also given very loosely watched "charging" privileges.
35. Congressmen and staff can charge training programs, study courses, and information courses to the congressman's expense account.
36. Congressmen and their families may borrow materials from the Library of Congress. The public may not do so.

37. Congressmen are exempt from jury duty.
38. During "official trips," congressmen, staff and spouses often get abnormal amounts of "free" time, along with taxpayer-subsidized ground transportation, alcohol, entertainment, and even "per diem" cash for personal expenses.
39. Congress has exempted itself from:
 - The Social Security Act of 1933
 - The National Labor Relations Act of 1935
 - The Minimum Wage Act of 1935
 - The Equal Pay Act of 1963
 - The Civil Rights Act of 1964
 - The Freedom of Information Act of 1966
 - The Age Discrimination Act of 1967
 - The Occupational Safety and Health Act of 1970
 - The Equal Employment Opportunity Act of 1972
 - Title IX, Higher Education Act Amendments of 1972
 - The Rehabilitation Act of 1973
 - The Privacy Act of 1974
 - The Age Discrimination Act Amendments of 1975
 - The Ethics in Government Act of 1978
 - The Civil Rights Restoration Act of 1988
40. Congressmen get a \$3,000 tax deduction for added living expenses.

11 14
Nos. 93-1456, 93-1828

Supreme Court, U.S.

FILED

AUG 16 1994

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

U.S. Term Limits, Inc., et al.,

Petitioners,

v.

Ray Thornton, et al.,

Respondents.

On Writ of Certiorari To The
Supreme Court of the State of Arkansas

BRIEF OF VIRGINIANS FOR TERM LIMITS, NORTH
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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
Interest Of The Amici Curiae	1
Statement Of The Case	3
Summary Of Argument	3
Argument	5
I. Arkansas' Ballot Access Restriction Is A Constitutionally Permissible Regulation Of The "Manner" Of Elections To House And Senate Positions.	5
II. Arkansas' Ballot Access Restriction Is Constitutionally Permissible Under The Qualifications Clauses Of Article I	11
III. The Tenth Amendment Supports State Power To Restrict Multiterm Incumbents In House And Senate Elections.	20
IV. Arkansas' Ballot Access Restriction Does Not Violate The First Or Fourteenth Amendment	22
Conclusion	29

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	24
<i>Beer v. United States</i> , 425 U.S. 130 (1976)	24
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973)	26
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	27, 28, 29
<i>Bullock v. Carter</i> , 405 U.S. 134 (1972)	23, 24
<i>Burdick v. Takushi</i> , 112 S. Ct. 2059 (U.S. 1992)	5, 8, 9, 23, 24, 28
<i>CSC v. Letter Carriers</i> , 413 U.S. 548 (1973)	26
<i>Clements v. Fashing</i> , 457 U.S. 957 (1982)	8, 9, 27
<i>Eu v. San Francisco County Democratic Central Committee</i> , 489 U.S. 214 (1989)	28
<i>Gaffney v. Cummings</i> , 412 U.S. 735 (1973)	24
<i>Garcia v. San Antonio Metropolitan Transit Authority</i> , 469 U.S. 528 (1985)	21
<i>Gregory v. Ashcroft</i> , 501 U.S. 452, 111 S. Ct. 2395 (1991)	4, 20, 21, 28
<i>Hopfmann v. Connolly</i> , 746 F.2d 97 (1st Cir. 1984), vacated in part on other grounds, 471 U.S. 459 (1985)	11

<i>Jenness v. Fortson</i> , 403 U.S. 431 (1971)	26, 27
<i>Karcher v. Daggett</i> , 462 U.S. 725 (1983)	24
<i>New York v. United States</i> , 112 S. Ct. 2408 (U.S. 1992)	21
<i>Nixon v. United States</i> , 113 S. Ct. 732 (U.S. 1993)	12
<i>Ohio ex rel Davis v. Hildebrandt</i> , 241 U.S. 565 (1916)	10
<i>Oregon v. Mitchell</i> , 400 U.S. 112 (1970)	7
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969)	4, 12, 15, 23
<i>Quinn v. Millsap</i> , 491 U.S. 95 (1989)	24
<i>R.A.V. v. St. Paul</i> , 112 S. Ct. 2538 (U.S. 1992)	26
<i>Smiley v. Holm</i> , 285 U.S. 355 (1932)	4, 7, 10
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	7, 8, 27
<i>Sugarman v. Dougall</i> , 413 U.S. 634 (1973)	8
<i>Tashjian v. Republican Party of Connecticut</i> , 479 U.S. 208 (1986)	8
<i>United States v. Darby</i> , 312 U.S. 100 (1941)	20

U.S. CONSTITUTION

Article I, Section 2, clause 1	19
Article I, Section 2, clause 2	11
Article I, Section 2, clause 5	12
Article I, Section 3, clause 1	9
Article I, Section 3, clause 3	11
Article I, Section 3, clause 6	12
Article I, Section 4, clause 1	5
Article I, Section 5, clause 1	12
Article I, Section 8, clause 4	18
Article I, Section 8, clause 17	12
Article I, Section 10, clause 1	13
Article I, Section 10, clause 2	13
Article I, Section 10, clause 3	13
Article VI, clause 3	13
First Amendment	<i>passim</i>
Tenth Amendment	<i>passim</i>
Fourteenth Amendment	<i>passim</i>

Seventeenth Amendment	<i>passim</i>
---------------------------------	---------------

Nineteenth Amendment	<i>passim</i>
--------------------------------	---------------

STATE CONSTITUTIONS

Arkansas Constitution	<i>passim</i>
Arkansas Constitutional Amendment 73	5, 23, 25
Michigan Constitution, Art. II, Sec. 10	26
Missouri Constitution, Art. III, sec. 45(a)	26
Ohio Constitution Article V, section 8	26
South Dakota Constitution, Art. III, sec. 32	26

STATUTES

2 U.S.C. § 2a(c)	10
2 U.S.C. § 6	7
2 U.S.C. § 9	7
Act of Jan. 29, 1795, ch. 20, 1 Stat. 414	18

LEGISLATIVE MATERIALS

Articles of Confed. Art. V (1781)	15
---	----

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(Max Farrand, ed; rev. ed., 1966) 15, 16, 20
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(Philip S. Foner ed., 1944) 17, 20
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for Term Limits (1993) 7
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of the United States (1st ed. 1833) 21, 22
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Constitutions, Colonial Charters,
and Other Organic Laws of the States,
Territories, and Colonies Now or
Heretofore Forming the
United States of America (1909) 18, 19
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Limits and the Recovery of Deliberative
Democracy (1992) 25
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American Republic, 1776-1787 (1969) 19

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Term Limits: Unconstitutional By
Initiative, 67 Wash. L. Rev. 415 (1992) 22

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Clause and the Constitution of
Religious Liberty: A Machine That
Has Gone of Itself,
37 Case W. Res. L. Rev. 674 (1987) 13, 14
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State-Enacted Term Limits Under the
Qualifications Clauses,
71 Tex. L. Rev. 865 (1993) 19, 23
- Neil Gorsuch and Michael Guzman, Will The
Gentlemen Please Yield? A Defense of the
Constitutionality of State-Imposed Term
Limitations, 20 Hofstra L. Rev. 341 (1991) . . 7, 26
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Constitutional Limits On Federal
Congressional Terms,
53 U. Pitt. L. Rev. 97 (1991) 18, 20
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Intentions in Constitutional Adjudication:
Three Objections and Responses,
82 Nw. U.L. Rev. 226 (1988) 16
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Article V: Term Limits and the
Seventeenth and Nineteenth
Amendments, 103 Yale L.J. 1971 2, 6
- Joshua Levy, Note, Can They Throw the
Bums Out? The Constitutionality
of State-Imposed Congressional Term
Limits, 80 Geo. L.J. 1913 (1992) 2, 21, 23

In The
Supreme Court of the United States
October Term, 1994

Nos. 93-1456, 93-1828

U.S. Term Limits, Inc., et al.,

Petitioners,

v.

Ray Thornton, et al.,

Respondents.

Brief of
Virginians For Term Limits,
North Carolina Term Limits Coalition,
South Carolinians For Term Limits,
Louisiana For Term Limits, And
Eight Is Enough As Amici Curiae
In Support Of Petitioner

INTEREST OF THE AMICI CURIAE

Amici are non-partisan, grassroots organizations seeking to provide the citizens and legislatures of their respective States with the opportunity to vote on ballot restrictions or term limits for long-term incumbents, including members of Congress. As advocates for this reform, amici believe that this case is of the highest importance and wish to have their views heard by this Court. Amici believe that the Arkansas law is constitutional, and that the Arkansas Supreme Court's decision to the contrary should be reversed.

These organizations, all from southeastern States, are at varying stages of grassroots work to educate the public about the desirability of term limits or ballot access restrictions for officials elected to both state and federal office. The Florida organization, Eight is Enough, was instrumental in placing an initiative like the Arkansas law before the electorate in Florida which was adopted by 77% of the voters. Louisiana for Term Limits, founded by former Governor Buddy Roemer, has done massive public education and lobbying efforts which it hopes will lead to similar principles being incorporated into the Louisiana Constitution by 1995. Obviously, the very existence of these organizations is vitally affected by the outcome of this case.

Although over 70% of the population of the United States favors limiting incumbents, *see* Joshua Levy, Note, *Can They Throw the Bums Out? The Constitutionality of State-Imposed Congressional Term Limits*, 80 Geo. L. J. 1913, 1916 (1992), the only feasible way to achieve this reform is through state legislative action or initiative. The Arkansas constitutional amendment was approved by a 59.9% vote. In the 1990s, ballot issues imposing term limits or ballot access restrictions upon Senators and House members were approved by "landslide majorities" in fourteen other States: Arizona 74%, California 63%, Colorado 71%, Florida 77%, Michigan 59%, Missouri 74%, Montana 67%, Nebraska 68%, North Dakota 55%, Ohio 66%, Oregon 69%, South Dakota 63%, Washington 52%, Wyoming 77%. Kris W. Kobach, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 Yale L.J. 1971 and n. 1-2 (1994). Nine of these States adopted provisions virtually identical to those of Arkansas.

Two-thirds of Congress is unlikely to support a constitutional amendment to achieve electoral reform, because Congress itself is made up of incumbents who could lose their

seats as a result of term limits. A basic reform in the election process in this country could, however, be achieved through a process of incremental change at the state level. Two other popular movements to change the election process, culminating in the Seventeenth and Nineteenth Amendments, proceeded first through state-level action. Regardless of the prospects for a constitutional amendment, each of the Amici believes that the people of its State should have the opportunity to adopt some type of electoral reform for that State. Term limits initiatives, including ballot access rules such as the one at issue here, would help level the playing field between incumbents and other candidates and result in better representation for the people of each State.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth by Petitioners.

SUMMARY OF ARGUMENT

The Arkansas Constitution disables certain multiterm incumbents of the House of Representatives and United States Senate from having their names placed on the ballot for reelection to positions they have long held. Contrary to the holding of the Supreme Court of Arkansas, Arkansas Constitutional Amendment 73 fits easily within the parameters of the United States Constitution.

The United States Constitution provides broad latitude to the States to regulate the time, place, and manner of federal elections. Congress, through legislation, may in turn overrule such state regulations, thereby protecting federal interests. Arkansas' unwillingness to place certain multiterm incumbents' names on its ballots permissibly regulates the "manner" of such elections, for such incumbents may still be

reelected through write-in campaigns. Decisions of the Court confirm that Arkansas has acted well within its authority to "provide a complete code for congressional elections," *Smiley v. Holm*, 285 U.S. 355, 366 (1932). This ballot access restriction is not distinguishable from state-imposed waiting period rules, resign-to-run-rules, and rules prohibiting write-ins, all of which the Court has approved.

The Arkansas restriction on ballot access does not disqualify anyone from holding federal office. Therefore, it should not be evaluated under the Qualifications Clauses of Article I. If the Court does evaluate the provisions of the Arkansas Constitution at issue under these clauses, it should find them to be constitutionally sound. Properly read, these clauses establish only three minimum federal qualifications for office -- age, citizenship, and state habitancy. The text of several interrelated provisions of the Constitution, the history surrounding issues of qualifications for federal office, and contemporaneous practices all support the permissibility of Arkansas' ballot access restrictions. Neither *Powell v. McCormack*, 395 U.S. 486 (1969), nor any other decision of the Court is to the contrary.

The Tenth Amendment confirms that the States have extensive powers to enact restrictions on ballot access for multiterm incumbents. Historical authority indisputably supports this proposition. Moreover, the Court's decision in *Gregory v. Ashcroft*, 501 U.S. 452, 111 S. Ct. 2395 (1991), utilizes the "numerous and indefinite" powers remaining with the States to approve a state age limit for elected officials.

Finally, Arkansas' ballot access restrictions do not violate the First or Fourteenth Amendments. Arkansas has not invidiously discriminated against any protected class, nor has it barred from the ballot those holding or expressing any particular views. Indeed, it is less limiting on well-known

incumbents desiring further reelection than the restrictions approved by this court in *Burdick v. Takushi*, 112 S. Ct. 2059 (U.S. 1992).

ARGUMENT

I. ARKANSAS' BALLOT ACCESS RESTRICTION IS A CONSTITUTIONALLY PERMISSIBLE REGULATION OF THE "MANNER" OF ELECTIONS TO HOUSE AND SENATE POSITIONS.

As recently amended through a statewide initiative, the Arkansas Constitution forbids printing certain multiterm incumbents' names on ballots in House and Senate elections.^{1/} The Time, Place and Manner Clause of the Constitution^{2/} provides States with broad authority to conduct

^{1/} The provisions of the Arkansas Constitution at issue read as follows:

(a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas.

(b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas.

Arkansas Constitutional Amendment 73 § 3.

^{2/} Article I, Section 4, clause 1 provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may
(continued...)

congressional election. It also protects federal interests, for state regulations may be overridden by federal statute.^{3/} The States could then overturn such a statute only through a constitutional amendment.^{4/}

This case poses two questions under the Time, Place and Manner Clause. First, is Arkansas' refusal to print the names of certain incumbents on the ballot a regulation concerning the "manner" of congressional elections? Second, was Arkansas' statewide initiative a permissible process for enacting such an election regulation?

2/ (...continued)

at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

3/ If the Court holds that Arkansas permissibly restricted the printing of multiterm incumbents on its ballots as a component of the state's regulation of the "manner" of elections, Congress could pass legislation requiring all states to permit the printing of the names of multi-term incumbents on their ballots.

4/ Any such constitutional amendment would be particularly difficult to adopt since the normal amendment route requires passage by two-thirds of both houses of Congress, and many congressional incumbents are hostile to the term limits movement. In the twentieth century, only one anti-incumbency proposal has ever come to the floor of Congress, and on that occasion it received only its sponsor's vote. Over 100 additional proposals have since died in committee. Historically, the most comparable situation to the instant case is the Seventeenth Amendment, which provided for direct election of Senators. In the nineteenth century, numerous proposals for direct election of Senators died in committee, killed by Senators selected by state legislatures. Only after 28 states, from 1905-1908, pushed their state legislators to be bound by the results of popular votes for Senate candidates did the Seventeenth Amendment move forward. Popularly-supported Senators transformed the previously-obstructionist Senate. The Amendment was then ratified less than eleven months after Congress' submission of it to the states. See generally Kobach, *supra* at 1976-79.

1. *Manner*. The Court has regularly permitted a wide range of state regulations concerning the "time, place and manner" of congressional elections. In *Smiley*, 285 U.S. at 366, for example, the Court noted that "these comprehensive words embrace authority to provide a complete code for congressional elections."^{5/} Congressional authority to trump such state election codes is correspondingly broad. See, e.g. 2 U.S.C. § 9 (votes not by written or printed ballot or voting machine authorized by state law "of no effect") and 2 U.S.C. § 6 (reducing representation of States if right to vote abridged). See also *Oregon v. Mitchell*, 400 U.S. 112, 118-25 (1970) (opinion of Black, J.) (establishing voting age and voting districts are "manner" issues; Congress' power identical to state power but Congress is ultimate decision-maker). See generally Neil Gorsuch and Michael Guzman, *Will The Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitations*, 20 Hofstra L. Rev. 341, 350 (1991) (reviewing the "scheme of shared power embodied in Article 1, section 4").

Three of the Court's cases powerfully affirm the breadth of state authority to refuse to print incumbents' names on ballots for congressional elections. In *Storer v. Brown*, 415 U.S. 724 (1974), the Court upheld a California "waiting period" law denying ballot access to independent candidates affiliated with a political party within the twelve months prior

5/ The Court's broad reading of this clause is fully consistent with the ratification debates which focused on this clause. In these debates, Federalists argued that the states were given broad powers in the first instance to regulate elections, even to the point of abolishing federal elections, but that Congress could override state abuses by passing legislation to protect itself. The Anti-Federalists agreed that the clause had this breadth, and objected to Congress' plenary power to trump state regulation of federal elections. See generally Stephen J. Safranek, *The Constitutional Case for Term Limits*, at 3-13 (1993).

to the primary preceding the election. It brushed aside the claim that the States lacked authority under Article I to deny ballot access to a category of candidates as "wholly without merit." *Id.* at 736 n. 16. Similarly, *Clements v. Fashing*, 457 U.S. 957 (1982), upheld a Texas "resign-to-run" law requiring state officials to resign before running for state or federal offices.^{6/} As in *Storer*, the Court assumed that the States had broad Article I authority to regulate the elections and focused on whether state law violated the First and Fourteenth Amendments. Finally, in *Burdick*, the Court upheld a Hawaii statute prohibiting write-in candidates altogether in congressional and other elections. The Court began its analysis by citing the Time, Place and Manner Clause and noted that "the Court therefore has recognized that States retain the power to regulate their own elections. *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986)." 112 S. Ct. at 2063.

No principled distinction exists between these cases and the instant case. Like candidate waiting period rules, resign-to-run rules, and rules prohibiting write-ins, Arkansas' ballot rule involves the "manner" of elections. That such regulations "will invariably impose some burden upon individual voters" and candidates is not dispositive. *Burdick*, 112 S.Ct. at 2063. Indeed, the multi-term incumbent denied ballot access by Arkansas is no worse off than the recently-independent candidate permissibly barred from the ballot under *Storer* -- both must wage write-in campaigns to get elected. This is surely, as the Court said in *Clements*, a "de

^{6/} Technically, only the provisions affecting state office were before the Court since none of the plaintiffs sought to run for federal office. *Clements* overruled a substantial number of state court decisions which had found "resign-to-run" laws unconstitutional.

minimis burden on the political aspirations" of multiterm incumbents already well-known to the people. 457 U.S. at 958. From the perspective of the voter, he or she merely faces the minor inconvenience of writing in a name rather than punching a ballot or pulling a lever. This inconvenience is far less than that to the Hawaii voters in *Burdick*, who were unable to write-in candidates at all.

Initiative. The Time, Place and Manner Clause vests authority to adopt such regulations "in each State by the Legislature thereof." Because Arkansas adopted its ballot access restriction in a statewide initiative, not by passage of a statute, it might be argued that the people of Arkansas usurped a power allocated in the Constitution solely with the state legislative body.

The logical fallacy of this argument is simply stated and its rejection is compelled by the Court's precedents. As a matter of logic, the electorate in Arkansas both elects the legislators and gives them, from time to time, fundamental "marching orders" through initiative processes authorized by the Arkansas Constitution. It would be strange if the greater power of the people did not encompass the lesser power of their representatives to make law. Therefore, it is not surprising that the Court has concluded, in decisions going back nearly 80 years, that the word "Legislature" refers to "legislative power," not merely the "legislative body."^{7/}

^{7/} The original United States Constitution did provide contrasting methods of selecting Senators and Representatives, so that "the Legislature" in Article I, Section 3, clause 1 could not be read to mean direct referendum processes without eviscerating the distinction drawn by the Framers in the processes for selecting holders of the two offices. No such counterpoint to "the Legislature" as that term is used in the Time, Place, and Manner Clause exists.

In *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), the Ohio legislature redistricted the State for purposes of congressional elections. The people of Ohio by referendum disapproved the redistricting plan, and suit was filed to declare the referendum illegal under the Time, Place and Manner Clause. The Court unanimously upheld the referendum, saying "the referendum constituted part of the state Constitution and laws, and was contained within the legislative power." *Id.* at 568. The Court also explicitly rejected "the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power, which in effect annihilates representative government." *Id.* at 569. See also *Smiley*, 285 U.S. at 355 (including the Governor's veto as a part of "legislature" under this clause where that was part of state lawmaking process). Thus, because Arkansas law permits the people to vote directly on amendments to the state constitution, such direct votes are in fact exercises of power by "the Legislature" for Time, Place and Manner Clause purposes.

The Court's decisions also comport with congressional approval of state legislative power exercised through direct as well as representative processes. In each of the cases above, the Court buttressed its constitutional interpretation with references to federal law which validated state electoral regulations adopted "in the manner provided by the laws thereof," including referendum processes. Federal law even today ratifies such processes. See 2 U.S.C. § 2a(c) (federal rules for election of Representatives only "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment").

II. ARKANSAS' BALLOT ACCESS RESTRICTION IS CONSTITUTIONALLY PERMISSIBLE UNDER THE QUALIFICATIONS CLAUSES OF ARTICLE I

Because the Arkansas Constitution does not prohibit anyone from campaigning for office, being elected, or serving in office, it should not be deemed a "qualification" for office at all.^{8/} See *Hopfmann v. Connolly*, 746 F. 2d 97, 103 (1st Cir. 1984), *vacated in part on other grounds*, 471 U.S. 459 (1985) (test of whether a restriction is a qualification is "whether the candidate 'could be elected if his name were written in by a sufficient number of electors.'"). Thus, it is not necessary for the Court to reach the complex issue of whether Arkansas' ballot access restrictions are permissible under the Qualifications Clauses of Article I.^{9/}

8/ Treatment of Arkansas' ballot provisions under the Time, Place and Manner Clause rather than the Qualifications Clauses would also have the desirable practical effect of preserving maximum flexibility for the political branches of government, since the former clause, unlike the latter clause, explicitly gives Congress the power to override state law. The state laws referred to *infra* at n. 28, which prohibit multiterm incumbents from further serving in certain offices, would provide a more appropriate opportunity for the Court to examine the scope of the Qualifications Clauses.

9/ Article I, Section 2, clause 2 provides: "No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."

Article I, Section 3, clause 3 provides: "No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."

The Qualifications Clauses merely establish Federal age, citizenship, and inhabitancy minimum requirements for House and Senate members. They do not preclude the people of the States from further limiting those who may represent them in Congress. Indeed, the Constitution's text and history, as well as contemporaneous practices, indicate that the Framers sought only to ensure that the States would not send unqualified elected officials to the new federal government.^{10/}

1. *Text.* The Qualifications Clauses do not state that the three listed requirements are the *only* or the *exclusive* criteria which may be established for membership in the House or the Senate; they do not by their terms preclude States from adding qualifications consistent with those contained in the clauses. Conversely, Article I elsewhere uses explicit phrasing when exclusivity was intended. For example, Article I, Section 2, clause 5 gives the House "the sole Power of Impeachment" and Article I, Section 3, clause 6 gives the Senate "the sole Power to try all Impeachments." See *Nixon v. United States*, 113 S. Ct. 732 (U.S. 1993) (sole power language means courts cannot resolve claims that Senate improperly tried an impeachment). Article I, Section 8, clause 17 grants Congress the power "to exercise exclusive Legislation" concerning the District of Columbia and "like

^{10/} As discussed more fully in Petitioner's Brief, the Court's decision in *Powell*, 395 U.S. at 486 is not to the contrary. The Court in *Powell* held only that one House of Congress could not, in its adjudicative capacity under Article I, Section 5, clause 1, add qualifications beyond those in the Qualifications Clauses. The concern of the Framers explored by the Court in *Powell* -- that incumbent members of Congress not be permitted to frustrate the will of electors within a state -- is wholly inapposite here, where the people of Arkansas concluded that their interests would be better served if long-term incumbents could be returned to Congress only if through ballot write-in campaigns.

Authority" with respect to Federal enclaves.⁹ Thus, the Framers well knew how to grant exclusive power over a given aspect of the federal structure.

Similarly, the Framers knew very well how to preclude the States from exercising particular powers, and did so explicitly on a number of occasions. For example, explicit bars on the States coining money, passing ex post facto laws, and impairing contracts were written into Article I, Section 10, clause 1. Prohibitions on state imposts and duties and war-related activities were made explicit in Article I, section 10, clauses 2 and 3. These direct prohibitions stand in marked contrast to the Constitution's ~~silence~~ on state power to add legislative qualifications.

Lastly, the Religious Test Clause of Article VI^{11/} provides that "no Religious Test" may be imposed for membership in Congress.^{12/} The existence of this clause is

^{11/} The third clause of Article VI reads in full as follows:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

^{12/} The Religious Test Clause was adopted against a background of preexisting religious tests for office-holding common to all states other than Virginia in 1787. Basically, "non-Christians" were barred from office in twelve of the original colonies, some colonies went even further in banning non-Protestants from office, and there were differences from state to state as to whether particular denominations were "Protestant" or not. See generally Gerard V. Bradley, *The No Religious Test Clause And* (continued...)

of major significance in construing the Qualifications Clauses for two reasons. Most significantly, the existence of this clause in the original Constitution is another example that the Framers knew how to and indeed did bar one specific qualification which the States might otherwise have imposed on those seeking to represent them in Congress. Their failure to bar the States or their people from enacting term limits, property ownership or other qualifications indicates that, unlike religious tests, such matters were not precluded by the Qualifications Clauses. Additionally, the Religious Test Clause applies only to federal offices; religious tests for state offices were left intact by the preceding clause, which added an oath or affirmation to support the Constitution as a requirement for state as well as federal office-holders. A distinction was thus drawn between state officials, who could be required to take religious oaths, and federal office-holders, who could not. The Framers could have but did not draw such a federal/state dichotomy in the Qualifications Clauses; this demonstrates that no federal prohibition on further state qualifications was intended, either for federal or state offices.

2. *History.* Much historical evidence points to the conclusion that the Qualifications Clauses merely established minimum objective proxies for personal maturity, loyalty to the infant nation, and alignment with interests of the people and States represented in Congress. Most tellingly, Edmund

¹²/(...continued)

The Constitution of Religious Liberty: A Machine That Has Gone Of Itself, 37 Case W. Res. 674, 681-87 (1987). The Framers made a distinct break from state practices when they adopted the Religious Test Clause for federal office virtually unanimously and without much debate. *Id.* at 687-94. Profound and explosive debate over the clause occurred during the ratification process, *id.* at 694-711, but when the dust settled, a clause which displeased many was simply left for further treatment in the First Amendment of the Bill of Rights.

Randolph's original version of this provision in the Committee of Detail had proposed language which would have made these qualifications exclusive.^{13/} But this language was eliminated by the Committee on Detail in its report to the Constitutional Convention. 2 Farrand, *supra*, at 137 n.6, 178. It is almost unthinkable that this Court would read these clauses as establishing exclusive -- rather than minimum -- qualifications, for that would undo the work of the Committee on Detail adopted by the Constitutional Convention.

To be sure, the Constitutional Convention considered and rejected *federal* limitations on the membership of the House and Senate, such as property ownership requirements and term limits.^{14/} Numerous statements of various Framers, some reviewed by the Court in *Powell*, 395 U.S. at 486, support the view that the Qualifications Clauses were not

^{13/} The proposed language was:

"5. The qualifications of (a) delegates shall be the age of twenty five years at least, and citizenship: (*and any person possessing these qualifications may be elected except*)"

2 Records of the Federal Convention of 1787 139 (Max Farrand, ed., rev. ed., 1966) (hereinafter "Farrand") (emphasis added).

^{14/} The Constitutional Convention rejected provisions which would have established federal minimum property limitations, *see* 2 Farrand, *supra*, at 249, and federally-imposed limits on congressional terms. 1 Farrand, *supra*, at 20. The Constitutional Convention thus declined to follow the route of the Articles of Confederation, which had established as a matter of federal law that "no person shall be capable of being a delegate for more than three years in any term of six years. . . ." Art. of Confed. Art. V (1781).

intended to prohibit the States from adding to the minimum federal qualifications.^{15/}

Both James Madison and Alexander Hamilton made statements that the qualifications for office were fixed by the Constitution. These statements, however, were in the context of the dangers of the *federal* government adding additional qualifications. Madison stated, in opposing a provision to empower Congress to set property qualifications:

The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the [federal] Legislature could regulate those of either, it can by degrees subvert the Constitution.

2 Farrand, *supra*, at 249-50. In The Federalist No. 60, Hamilton stated:

The truth is that there is no method of securing the rich the preference apprehended but by prescribing qualification of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections. The qualifications of the

^{15/} The Court has frequently turned to statements of the Framers for assistance in reconstructing the original understanding of the Constitution. See generally Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U.L.Rev. 226 (1988).

persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.

The Federalist No. 60, at 371 (Clinton Rossiter ed., 1961) (hereinafter "The Federalist"). These comments did not imply any restriction against the States' setting qualifications. Indeed, Hamilton emphasized that the Framers "have submitted the regulation of elections for the federal government, in the first instance, to the local administrations." The Federalist No. 59, at 362-63.

Finally, Thomas Jefferson directly addressed the issue of whether the Constitution set forth exclusive or minimum qualifications for office as follows:

But it does not declare, itself, that the member shall not be a lunatic, a pauper, a convict of treason, of murder, of felony, or other infamous crime, or a non-resident of his district; nor does it prohibit to the State the power of declaring these, or any other disqualifications which its particular circumstances may call for; and these may be different in different States. Of Course, then, by the tenth amendment, the power is reserved to the State.

Basic Writings of Thomas Jefferson 725 (Philip S. Foner ed., 1944).

3. *Contemporaneous Practice.* Lastly, three historical practices compellingly support the Framers' understanding that the Qualifications Clauses set forth minimum qualifications, not exclusive qualifications. First,

two of the three restrictions contained in these clauses were determined at the time of the Constitution's ratification under state, not Federal, law. Citizenship varied from State to State,^{16/} and residency or habitation was defined by each State. It would be exceedingly strange for the Constitution to have established federal minimum requirements dependent upon state law while implicitly withdrawing the ability of the States to add criteria they deemed appropriate for their elected House and Senate members.^{17/}

Second, additional state requirements for the holding of office were common at the time of the Constitution's ratification. For example, Maryland, Massachusetts, New Jersey, North Carolina, and South Carolina required that legislators own property of varying amounts, while Pennsylvania required merely that legislators be "persons most noted for wisdom and virtue."^{18/} Indeed, term limits were a popular reform in the 1770s, with seven States (Delaware, Georgia, Maryland, North Carolina, Pennsylvania, South Carolina, and Virginia) adopting varying term limits for

^{16/} Congress enacted the first naturalization law in 1795, under its Article I, Section 8, clause 4 power to "establish an uniform Rule of Naturalization." Act of Jan. 29, 1795, ch. 20, 1 Stat. 414.

^{17/} See Roderick M. Hills, Jr., *A Defense of State Constitutional Limits On Federal Congressional Terms*, 53 U. Pitt. L. Rev. 97, 117-18 (1991).

^{18/} Md. Const. of 1776, art. II, reprinted in 3 Francis N. Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 1669, 1691* (1909) (hereinafter "Thorpe"); Mass. Const. of 1780, part 2, ch. I, § III, art. III, reprinted in 3 Thorpe at 1888, 1898; N.J. Const. of 1776, art. III, reprinted in 5 Thorpe at 2594, 2595; N.C. Const. of 1776, art. VI, reprinted in 5 Thorpe at 2787, 2790; S.C. Const. of 1778, art. XII, reprinted in 6 Thorpe at 3248, 3250-51.

various offices.^{19/} The Framers must have been aware of these varied state-by-state practices, for four state delegations to the Congress were themselves subject to term limits.^{20/} Because such limits were common but not uniform, it is likely that no consensus was possible at the Constitutional Convention and that a uniform federal requirement would have lessened chances for ratification.^{21/}

Third, the historical context for the State Electors Clause (Article 1, section 2, clause 1) provides strong support for the proposition that the States could add further qualifications to the federal age, citizenship, and inhabitancy minimums. The State Electors Clause provides that electors in each State who select House members "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."^{22/} Because the States did not permit legislators to be seated who were not qualified to vote as electors, this provision ensured that no lower

^{19/} Gordon S. Wood, *The Creation of the American Republic, 1776-1787* 140-41 (1969) (summarizing state practices and noting that in 1776 term limits were a "cardinal tenet" of the American Whig principles).

^{20/} 3 Thorpe 1695-97, 4 Thorpe 2467, 5 Thorpe 3084-85, 6 Thorpe 3742-43.

^{21/} See generally Robert C. DeCarli, *The Constitutionality of State-Enacted Term Limits Under the Qualifications Clauses*, 71 Tex. L. Rev. 865, at 875-80 (1993) (lack of federal consensus to adopt any specific limitation where state practices varied indicates that additional qualifications could be added by the states).

^{22/} The Framers did not establish a parallel restriction concerning selection of Senators by state legislatures. The Seventeenth Amendment, which provided for direct election of Senators, added an identical requirement that electors for the Senate "have the qualifications requisite for electors of the most numerous branch of the State legislatures."

standards could be adopted for selection of House members.^{23/} In light of the extensive restrictions which then existed on voting and service in state legislatures, it is simply not plausible that the Framers would explicitly incorporate such additional and varying state requirements for House positions while implicitly precluding application of state standards through the Qualifications Clauses.

III. THE TENTH AMENDMENT SUPPORTS STATE POWER TO RESTRICT MULTITERM INCUMBENTS IN HOUSE AND SENATE ELECTIONS.

The Tenth Amendment provides: "The powers not delegated to the United States, nor prohibited by it to the States, are reserved to the States respectively, or to the people." As the Court said in *United States v. Darby*, 312 U.S. 100, 124 (1941), the Tenth Amendment "states . . . that all is retained which has not been surrendered." This Amendment reinforces that the States and their people are empowered to add qualifications for congressional positions. Indeed, this interpretation is the only way to square the Qualifications Clauses with notions of Federalism reaffirmed by the Tenth Amendment. See Thomas Jefferson (Foner, ed.), *supra*, at 725.

The Court quite recently found that the Tenth Amendment supports state authority to impose hurdles or even absolute disqualifications upon candidates for office. In *Gregory* the Court upheld a term limit law ending terms of

^{23/} New Jersey may have been an exception in restricting the vote to citizens and legal adults, without explicitly imposing similar restrictions on state legislators. New Jersey's property ownership limitation for service as a state legislator may mean that this exception was more apparent than real. See generally Hills, *supra*, at 103-06.

elected state judges at age 70. 111 S. Ct. at 2395. The Court's analysis was not simply that federal law (the Age Discrimination in Employment Act) was inapplicable; rather, the Court relied upon the Tenth Amendment to create a strong presumption against congressional removal of state limits on elected officials. The Court found the imposition of term limits among the "numerous and infinite" powers remaining with state governments. *Gregory*, 111 S. Ct. at 2399.

Term limits opponents, nevertheless, have argued against applicability of the Tenth Amendment to this debate.^{24/} They assert that neither the States nor the people had any residual powers preserved by the Tenth Amendment to specify qualifications for members of the House and Senate, because there was no Congress about which such powers could have existed prior to 1789.^{25/} This argument is meritless for two reasons. First, the Tenth Amendment was ratified in 1791, two years after the Constitution, so that it must have applied to the Constitution's allocation of authority.

^{24/} The general argument that the Tenth Amendment is not a judicially enforceable provision of the Constitution, see, e.g. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (state sovereignty not unconstitutionally invaded by application of Fair Labor Standards Act); Joseph Story, 3 Commentaries on the Constitution of the United States § 1900 (1st ed., 1833) ("mere affirmation . . . that what is not conferred, is withheld, and belongs to the state authorities"), will not be addressed extensively here. This position is clearly untenable in light of the Court's recent decisions in *Gregory*, 111 S. Ct. at 2395 ("[t]he authority of a State's people to determine the qualifications of their most important government officials lies 'at the heart of representative government,' and is reserved under the Tenth Amendment.") and *New York v. United States*, 112 S.Ct. 2408 (U.S. 1992) (State sovereignty, as affirmed in the Tenth Amendment, forbids the Federal Government from compelling states to enact and administer federal regulatory programs).

^{25/} Levy, *supra*, at 1934-35; 2 Story, *supra*, at §§ 625-26.

Second, in a broader sense, the powers being preserved were all governmental powers not explicitly given the new Federal Government.

Opponents also submit that because Presidential term limits were achieved through constitutional amendment, congressional term limits also can be imposed only by amendment. See Brendan Barnicle, Comment, *Congressional Term Limits: Unconstitutional By Initiative*, 67 Wash. L. Rev. 415 (1992). This argument dates back to Justice Story's 2 Commentaries on the Constitution of the United States §§ 625-26 (1st ed. 1833), in which he argues that the States cannot add qualifications for Congress because they cannot add qualifications for President and "[e]ach is an officer of the Union." The fallacy of the argument, both in Justice Story's day and today, is that congressional term limits are distinguishable from Presidential term limits. Members of Congress represent a single State, while the President represents the entire country. A state's regulation of its representatives' qualifications does not impinge upon any other state's rights or on necessary national uniformity. In contrast, state disuniformity of ballots for national office could undermine the very concept of a national election: imagine Arkansas refusing to put George Bush on the presidential ballot and Texas refusing to put Bill Clinton on its ballot!

IV. ARKANSAS' BALLOT ACCESS RESTRICTION DOES NOT VIOLATE THE FIRST OR FOURTEENTH AMENDMENT

A decision by the Court that Arkansas' ballot restrictions are permissible exercises of state power would not provide free reign to the States to adopt abusive restrictions

on who could serve in Congress.^{26/} State election requirements are subject to judicial scrutiny under other provisions of the Constitution, especially the First and Fourteenth Amendments.^{27/}

Nevertheless, the Court has in fact rejected First and Fourteenth Amendment concerns raised in contexts similar to Arkansas' ballot access restriction. In *Burdick v. Takushi*, the Court held that "the mere fact that a state's system 'creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.'" 112 S.Ct. at 2063, quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972). The Court's analysis in *Burdick* was simple:

[w]hen a state election law provision imposes 'reasonable, non-discriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify the restrictions.

^{26/} Under the Time, Place and Manner Clause, as noted in Part I above, Congress has the authority to overturn state "Manner" restrictions through simple legislation. It is less certain whether Congress has authority to control the states' enactment of additional qualifications. Arguably, *Powell's* limitation of House-adjudicated qualifications to those concerning age, citizenship, and inhabitancy might be extended to Congressionally-legislated additional qualifications, but that is an issue not posed by this case. See DeCarli, *supra*, at 874-75; Levy, *supra*, at 1927.

^{27/} Respondents in this case have failed to preserve any such objections by failing to cross-petition regarding the Arkansas Supreme Court's decision that Amendment 73 did not violate the First and Fourteenth Amendments.

112 S. Ct. at 2063-64, quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). In *Burdick*, the Court concluded that an election law that barred write-ins created little burden on First or Fourteenth Amendment rights. 112 S. Ct. at 2059. The impact upon the electoral process is far less here than in *Burdick*, where write-in candidates were precluded altogether. So the remaining inquiry would simply be whether the state's interests were sufficient to justify the restrictions. Undoubtedly, they were, as a separate look at the Fourteenth and First Amendments will reveal.

1. *Fourteenth Amendment*. Obviously, racial or gender restrictions would be subject to heightened scrutiny and virtually certain invalidation under the Equal Protection Clause of the Fourteenth Amendment. Indeed, were any State today to adopt a property-holding requirement for election to the House or Senate, it is likely that such a requirement would be invalidated under the Fourteenth Amendment. See *Bullock v. Carter*, 405 U.S. 134 (1972) (large Texas filing fee for candidates violates Equal Protection Clause); *Quinn v. Millsap*, 491 U.S. 95 (1989) (requirement that governmental official own real property violates Equal Protection Clause).

The mere fact that some individuals will have a more difficult time electing their candidate or that some candidates will have a more difficult time getting elected does not pose a serious Fourteenth Amendment concern. Indeed, the Court has indicated that "gerrymandering" laws that attempt to encourage one type of candidate can survive Fourteenth Amendment challenges. See, e.g. *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (stating that redistricting to avoid contests between incumbents could be legitimate state interest); *Beer v. United States*, 425 U.S. 130, 141 (1976); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) (redistricting intended to result in "substantial political consequences").

The Arkansas Constitution's provisions at issue in this case are a far cry from race or gender cases; since there is no invidious classification, minimal or rational basis scrutiny is the appropriate way to evaluate this case. Under this standard, Arkansas' constitutional provision easily passes muster. The Preamble to Arkansas Constitution, Amendment 73, compellingly presents the views of that state's electorate:

The People of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the People of Arkansas, exercising their reserved powers, herein limit the terms of elected officials.

Even if these views ultimately prove erroneous, they are well within the realm of appropriate expressions of public policy. See generally George F. Will, *Restoration: Congress, Term Limits and the Recovery of Deliberative Democracy* (1992) (reviewing public policy arguments concerning the term limits debate). Moreover, the people of Arkansas acted with great restraint in permitting multiterm incumbents to run for office again if written in by the voters; other States have recently

passed term limits legislation barring incumbents from office altogether.^{28/}

2. *First Amendment.* The First Amendment also constrains the States from barring candidates for expression of particular political views. *Cf. R.A.V. v. St. Paul*, 112 S.Ct. 2538 (U.S. 1992) (striking a local ordinance for lack of viewpoint or content neutrality). The Arkansas ballot restriction does not violate any of the content or viewpoint neutrality decisions of the Court, for it does not disadvantage independent or third party candidates, or "insulate [voters] from the appeal of new political voices . . ." *Jenness v. Fortson*, 403 U.S. 431, 438-39 (1971) (upholding requirement for showing of support among electorate to gain ballot access).^{29/}

The Arkansas provisions fall evenly on all political parties and viewpoints. Broad but neutral prohibitions on political involvement and office-holding have been upheld by the Court, at least when there are strong justifications for such limitations. *CSC v. Letter Carriers*, 413 U.S. 548 (1973) (Hatch Act limitations on partisan political activities do not violate the First Amendment); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (state law prohibiting political activity and candidacy by state employees does not violate First Amendment). The Arkansas rule also is far more limited than the restrictions on political activity and candidacy of government employees upheld in *Broadrick* and *Letter*

^{28/} See, e.g., Michigan Constitution, Article II, section 10; Missouri Constitution Article III, section 45(a); Ohio Constitution Article V, section 8; South Dakota Constitution Article III, section 32.

^{29/} The Arkansas ballot restrictions may indeed open up the political process to new voices. See Gorsuch and Guzman, *supra*, at 341, 372 (Congress heavily dominated by white (93%) and male (95%) members).

Carriers. Significantly, *Clements*, 457 U.S. at 972, held that a state "resign to run" law did not violate the First or Fourteenth Amendment. Although Texas law restricted elected officials from becoming candidates when they wished, they could speak and campaign on behalf of third parties, contribute and expend money in political causes, and hold office in political parties.

Moreover, the Court repeatedly has held that a write-in option such as that provided by Arkansas is a sufficient alternative to printing on the ballot to avoid First and Fourteenth Amendment concerns. *Storer*, 415 U.S. at 736 n.7; *Jenness*, 403 U.S. at 434, 438, 439. In *Storer* the Court upheld a California statute that denied ballot access to any independent candidate who had supported a political party within the preceding year. 415 U.S. at 724. In sum, the Arkansas law does not violate the First Amendment because it places only a *de minimis* burden on the rights of speech and association.

Even if Arkansas' ballot restrictions did impose a burden on speech and association rights, however, it would still pass muster under the Court's decisions. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976), established that even a law which significantly interferes with First Amendment rights can pass constitutional muster if the State "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."

The important governmental purposes, set forth in the Preamble, are to reduce the power of entrenched incumbents "preoccupied with reelection" who ignore their duties, to increase voter participation, competition, and quality of representation. It increases the chance for a government

more sensitive to the diverse needs of a heterogeneous society, it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government, and it makes government more responsive

Gregory, 111 S. Ct. at 2399. These purposes are far more compelling than merely "equalizing the relative financial resources of candidates," an interest found insufficient to override a candidates' strong First Amendment right in speaking on behalf of his own candidacy in *Buckley*, 424 U.S. at 54.^{30/}

Although the Arkansas ballot access restriction need not be narrowly drawn because it has little impact upon First Amendment rights, *see Burdick*, 112 S. Ct. at 2059, the law is, in fact, narrowly drawn. It does not prevent anyone from writing in a vote for a multiterm incumbent, and it does not bar a multiterm incumbent from office. The ballot restriction is carefully tailored not to incapacitate incumbents, while helping competitors for office who are badly disadvantaged because they do not have the franking privilege, staff support,

^{30/} It is significant that the Arkansas ballot rule was enacted, not by the legislature, but by popular initiative. Prior cases that have involved successful First Amendment challenges to balloting restrictions concerned state legislation. *E.g. Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989) (legislature-passed regulation that prevented political parties from endorsing any candidate in the primary election violates First Amendment). Legislative action may be suspect because it is politically partisan or motivated by a desire to control administrative costs. Because the electorate's First Amendment rights are at stake, and the electorate itself is imposing the limit, rather than the legislature, there is some guarantee that the initiative does not stifle free speech.

the ability to channel federal money to influence votes, or the name recognition of incumbents. *See Buckley*, 424 U.S. at 31 n.33 ("[I]t is axiomatic that an incumbent usually begins the race with significant advantages.")

In sum, the modest restriction on multi-term incumbents -- keeping their names off the ballot -- is appropriate and tailored to address the specific problems articulated in Amendment 73's preamble while preserving an open electoral process. It does not impermissibly classify, discriminate, or impinge upon rights of expression or association.

CONCLUSION

For the reasons set forth herein, the decision of the Supreme Court of Arkansas should be reversed.

Respectfully submitted

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Supreme Court, U.S.
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**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1994

U.S. TERM LIMITS, INC.,
ARKANSANS FOR GOVERNMENTAL REFORM, INC.,
FRANK GILBERT, GREG RICE,
LON SCHULTZ, and SPENCER PLUMLEG,
Petitioners,

v.

RAY THORNTON, BLANCHE LAMBERT, DALE
BUMPERS, DAVID PRYOR, *et al.*,
Respondents.

STATE OF ARKANSAS EX REL. WINSTON BRYANT,
Attorney General of the State of Arkansas,
Petitioners,

v.

BOBBIE E. HILL, *et al.*,
Respondents.

**ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARKANSAS**

**BRIEF OF STATE OF WASHINGTON
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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117 pp

i
QUESTIONS PRESENTED

Although the questions presented by the parties are somewhat broader, Amicus State of Washington devotes this brief to the following two questions:

1. Does a state law, which restricts ballot access by long term incumbents seeking re-election, impose a qualification for office within the meaning of Article I, Sections 2 and 3 of the Constitution?

2. Does the Elections Clause, Article I, Section 4, preserve state authority to comprehensively legislate regarding elections to the Senate and House of Representatives, in the absence of an affirmative Congressional override?

TABLE OF CONTENTS

INTERESTS OF AMICUS	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. A STATE LAW THAT RESTRICTS BALLOT ACCESS OF LONG TERM INCUMBENTS, BUT WHICH DOES NOT PREVENT THE CANDIDATE RECEIVING THE MOST VOTES FROM TAKING OFFICE, DOES NOT ESTABLISH A QUALIFICATION FOR OFFICE	6
A. The Qualifications Clause Does Not Provide a Basis for Broad Challenges to State Elections Laws	6
B. Amendment 73 Imposes No Qualifications For Office	10
C. Rotation in Office Measures are Designed for Broad Effect on the Election System Over Time, and Do Not Change the Qualifications for Office	16
II. THE CONSTITUTION RESERVES TO THE STATES, PLENARY AUTHORITY (SUBJECT TO CONGRESSIONAL OVERRIDE) OVER THE CONDUCT OF ELECTIONS	17
A. The Constitution Does Not Establish Uniform National Rules for Elections .	18
B. State Authority Over Elections Structures is Plenary	22
CONCLUSION	24

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>American Party of Texas v. White</i> 415 U.S. 767 (1974)	7
<i>Anderson v. Celebrezze</i> 460 U.S. 780 (1983)	7, 9, 12, 13, 23, 24
<i>Boston Stock Exchange v. State Tax Comm'n</i> 429 U.S. 318 (1977)	19
<i>Cooley v. Board of Wardens</i> , 53 U.S. (12 How.) 299 (1852)	19
<i>Gregory v. Ashcroft</i> , 501 U.S. ___, 111 S. Ct. 2395 (1991)	18
<i>Hopfmann v. Connolly</i> 746 F.2d 97 (1st Cir. 1984), vacated on other grounds, 471 U.S. 459 (1985), opinion on remand 769 F.2d 24 (1st Cir. 1985), cert. denied 479 U.S. 1023 (1987)	10, 11
<i>Jenness v. Fortson</i> 403 U.S. 431 (1971)	13, 21
<i>Joyner v. Mofford</i> 706 F.2d 1523 (9th Cir.), cert. denied, 464 U.S. 1002 (1983)	12, 15
<i>Legislature v. Eu</i> 286 Cal. Rptr. 283, 816 P.2d 1309 (Cal. 1991)	8, 9
<i>Libertarian Party of Washington v. Munro</i> No. 92-36620, slip op. 7671 (9th Cir., July 14, 1994) . . .	21

<i>Lowe v. Fowler</i> 240 S.E.2d 70 (Ga. 1977)	12, 13
<i>Maddox v. Fortson</i> 172 S.E.2d 595 (Ga. 1970)	8
<i>Miyazawa v. City of Cincinnati</i> 825 F. Supp. 816 (S.D. Ohio 1993)	8
<i>Moore v. McCartney</i> 425 U.S. 927 (1976)	8
<i>Munro v. Socialist Workers Party</i> 479 U.S. 189 (1986)	6, 21, 24
<i>New State Ice Co. v. Liebmann</i> 285 U.S. 262 (1932)	21
<i>Nixon v. United States</i> 506 U.S. ___, 43 S. Ct. 732 (1993)	10
<i>Opinion of the Judges</i> 116 N.W.2d 233 (S.D. 1962)	14
<i>Oregon v. Mitchell</i> 400 U.S. 112 (1970)	22, 23
<i>Powell v. McCormack</i> 395 U.S. 486 (1969)	7, 10
<i>Public Citizen, Inc. v. Miller</i> 992 F.2d 1548 (11th Cir. 1993), <i>aff'g</i> 813 F. Supp. 821 (N.D. Ga. 1993)	11, 12
<i>Secretary of State v. McGucken</i> 222 A.2d 693 (Md. 1966)	14
<i>Skeen v. Hooper</i> 631 F.2d 707 (10th Cir. 1980)	13

<i>Smiley v. Holm</i> 285 U.S. 355 (1931)	23
<i>Stack v. Adams</i> 315 F. Supp. 1295 (N.D. Fla. 1970)	11
<i>State ex rel. Chandler v. Howell</i> 175 P. 569 (Wash. 1918)	13
<i>State ex rel. O'Sullivan v. Swanson</i> 257 N.W. 255 (Neb. 1934)	14
<i>State ex rel. Wettengel v. Zimmerman</i> 24 N.W.2d 504 (Wis. 1946)	15
<i>Storer v. Brown</i> 415 U.S. 724 (1974)	17, 23
<i>Thorsted v. Gregoire</i> 841 F. Supp. 1068 (W.D. Wash. 1994)	3, 7, 8, 9, 11, 14, 15, 18
<i>Thorsted v. Munro</i> Nos. 94-35222, 94-35223, 94-35267, 94-35385, 94-35287, and 94-35289 (9th Cir. consolidated Apr. 4, 1994)	3
<i>U.S. Term Limits, Inc. v. Hill</i> 872 S.W.2d 349 (Ark. 1994)	4, 8, 10, 11, 18, 19
<i>United States v. Classic</i> 313 U.S. 299, 319 (1941)	19, 22, 23
<i>West Virginia ex rel. Maloney v. McCartney</i> 223 S.E.2d 607 (W. Va.)	8
<i>Wyoming v. Oklahoma</i> 502 U.S. ___, 112 S. Ct. 789 (1992)	19

Constitutions

Ark. Const. amend. 73, § 3	2, 4, 12
U.S. Const. art. I, § 2, cl. 3	4
U.S. Const. art. I, §§ 2 & 3	passim
U.S. Const. art. I, § 4	17
U.S. Const. art. I, § 4, cl. 1	3, 4, 6, 17, 18
U.S. Const. art. I, § 8	19

Statutes & Regulations

Wash. Rev. Code § 29.51.173 (1992)	2
Wash. Rev. Code § 29.68.015 (Supp. 1993)	2, 16
Wash. Rev. Code § 29.68.016 (Supp. 1993)	2, 16

Other Authorities

2 THE DEBATE ON THE CONSTITUTION (Library of America, 1993)	20
BLACK'S LAW DICTIONARY (6th ed. 1991)	12
James M. Buchanan and Gordon Tullock, THE CALCULUS OF CONSENT (1962)	24
M. Barone and G. Ujifusa THE ALMANAC OF AMERICAN POLITICS 1994	13
Willi Paul Adams, THE FIRST AMERICAN CONSTITUTIONS (1980)	21

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**ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARKANSAS**

**BRIEF OF STATE OF WASHINGTON
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

INTERESTS OF AMICUS

The State of Washington participates in this case to protect the authority of the voters of the state to determine the course and scope of their own electoral process. This case

presents a fundamental question regarding the role of the states in our federal constitutional system. This Court will be asked to determine whether a state may regulate the manner in which its representatives in Congress are elected in the same ways it governs its own state electoral process.

In November, 1992, the voters of Washington approved Initiative 573, which is designed to encourage rotation in office for members of both Houses of Congress, as well as for various state offices. The initiative promotes rotation in office by denying certain incumbent officers the right to file declarations of candidacy and appear on the ballot for re-election to the same office. The Washington measure denies ballot access to any candidates for the U.S. House of Representatives who by the end of the then current term of office will have served as a Representative for six out of the previous twelve years, and candidates for the Senate who will have served for twelve of the previous eighteen years. Wash. Rev. Code §§ 29.68.015 and .016 (Supp. 1993).¹

Although the Washington initiative denies ballot access to these categories of long-term incumbents, it specifically permits such candidates to run write-in campaigns. Wash. Rev. Code § 29.51.173. Washington, like Arkansas, imposes no barriers to holding office upon any successful candidate.

Washington's initiative was challenged within months of its enactment in the United States District Court for the Western District of Washington. On February 10, 1994, that Court issued an order on dispositive motions granting summary judgment in favor of the challengers, and holding Initiative 573

¹ This limitation to a period of years differs from the approach taken by Arkansas that is at issue in this case. Arkansas places a permanent ban on ballot access for a particular office once a threshold tenure is reached in a particular office, while Washington allows access again after a period of time. Compare Ark. Const. amend. 73, § 3 with Wash. Rev. Code §§ 29.68.015 and .016.

unconstitutional. *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994).²

Because of the similarity of issues between this case and *Thorsted*, Washington appears in this Court to defend the policy choice enacted by Washington voters in adding this limitation on ballot access. The United States Constitution, in Article I, Section 4, reserves to the states the function of conducting and regulating elections, including those of Senators and Representatives. This Court should reject this effort to judicially restrict the authority of the states to determine the rules by which their representatives in Congress will be selected.

STATEMENT OF THE CASE

The Elections Clause of the United States Constitution reserves to the states the function of determining the course and scope of the process of electing Representatives and Senators to the Congress. U.S. Const. art. I, § 4, cl. 1. By this action, respondents seek to deny both the states and the voters the ability to implement their preferences as to how their representatives in Congress will be chosen.

In November, 1992, the voters of Arkansas, by initiative, adopted Amendment 73 to their state constitution. That amendment promotes rotation in office among elected officials. As to members of the state's delegation to Congress, the amendment prohibits the placement on the ballot of the names of candidates who have served specified numbers of terms, for re-election to the same office. This limitation applies to those who have previously been elected to three or more terms

² Appeals from that decision are currently pending before the United States Court of Appeals for the Ninth Circuit. *Thorsted v. Munro*, Nos. 94-35222, 94-35223, 94-35267, 94-35385, 94-35287, and 94-35289 (9th Cir. consolidated Apr. 4, 1994).

in the House of Representatives, or two or more terms in the Senate. Ark. Const. amend. 73, § 3.³

The Supreme Court of Arkansas held the application of Amendment 73 unconstitutional as to the Congressional delegation. The court regarded the limitation on ballot access as a "qualification" for office, although noting that such candidates could still seek re-election by write-in. *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 356-57 (Ark. 1994). The court upheld the amendment from a challenge based upon the First and Fourteenth Amendments, which would have applied to both state and federal offices. *Id.* at 360.

The decision of the Arkansas court raises fundamental questions regarding the role of the states within a federal system. Members of Congress are elected by state, rather than by districts distributed nationally. U.S. Const. art. I, § 2, cl. 3. The constitution reserves to the states the power to determine the manner of conducting such elections. U.S. Const. art. I, § 4, cl. 1. The reasoning of the lower court would replace the sovereignty of the states with a categorical imperative of uniformity unsupported by actual requirements of a federal system.

³ The amendment also limits the number of terms that may be served by state executive officers and legislators. The Arkansas Supreme Court upheld the constitutionality of the amendment as applied to those officers. *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 359-60 (Ark. 1994). Given the absence of a cross-petition from the decision of the court below, the application of Amendment 73 to those officers is not before this Court.

SUMMARY OF ARGUMENT

Amicus Washington devotes this brief to consideration of two fundamental concepts underlying this action. In view of the decision below that Amendment 73 violates the Qualifications Clauses found in Article I, Sections 2 and 3, it is necessary to determine what varieties of legal precepts will constitute "qualifications." The manner in which this Court defines that term will not only guide the decision that follows, but fundamentally affect future litigation regarding state regulation of elections, including potentially reopening litigation over issues previously regarded as settled.

This analysis reveals that a state law that does not prohibit the winner of an election from taking office does not constitute a qualification. Amendment 73 does not impose a qualification, because it does not wholly bar long-term incumbents from winning and taking office. Although the measure certainly makes victory more difficult for such candidates, their grievance in this regard must be reviewed under traditional First and Fourteenth Amendment ballot access principles. Courts applying such principles to similar measures (and to this measure in the lower court) virtually always uphold such provisions.

The second portion of this brief turns to consideration of the Elections Clause of Article I, Section 4. This clause preserves plenary state authority over the elections process, subject only to affirmative Congressional override. This provision makes clear that the states, as an integral aspect of their role in the federal system, retain their authority to legislate comprehensively regarding Congressional elections. Although the lower court assumed, without discussion, that a national rule of uniformity must characterize all federal elections, the Elections Clause preserves state discretion to adopt differing systems for determining their own Congressional representation. The states therefore retain authority to adopt their own provisions governing federal elections, so long as they do not violate other constitutional provisions.

Consideration of these points reveals that Amendment 73 does not impose a qualification for office, because it does not bar any candidates from office. Instead of raising issues under the Qualifications Clauses, Amendment 73 is an exercise of the states' authority to regulate elections under Article I, Section 4. The Constitution imposes no automatic rule of uniformity in such elections, but instead allows Congress the option of overriding state legislation where it affirmatively deems it appropriate to do so.

ARGUMENT

I. A STATE LAW THAT RESTRICTS BALLOT ACCESS OF LONG TERM INCUMBENTS, BUT WHICH DOES NOT PREVENT THE CANDIDATE RECEIVING THE MOST VOTES FROM TAKING OFFICE, DOES NOT ESTABLISH A QUALIFICATION FOR OFFICE.

A. The Qualifications Clause Does Not Provide a Basis for Broad Challenges to State Elections Laws

The Arkansas Court invalidated Amendment 73 as an asserted violation of the Qualifications Clauses, contained in Article I, Sections 2 and 3 of the United States Constitution. Those clauses prohibit service in either the House of Representatives or Senate unless an individual satisfies specified age, residence, and citizenship qualifications.

This issue presents a fundamental threshold question, the importance of which potentially extends to many future cases involving state election laws. Prior to determining how, or whether, the Qualifications Clauses apply to Amendment 73, this Court must determine what varieties of state elections laws constitute "qualifications," in light of the state function of conducting and regulating elections. U.S. Const. art. I, § 4, cl. 1.

This Court has not previously had the opportunity to review this question. Although cited by some as if it dictated the result of this case, the decision of this Court in *Powell v. McCormack*, 395 U.S. 486 (1969), determined only that a single house of Congress, acting alone and in a disciplinary capacity under Article I, Section 5, may not add qualifications to those already enumerated. Given this dearth of guidance from previous decisions of this Court, Amicus Washington derives its analysis largely from decisions of lower courts and underlying concepts. Although not binding upon this Court, such background can enlighten the intellectual basis upon which a thorough understanding of the issues can be based.

Neither the Arkansas Court in this case, nor the district court in the related Washington case, *Thorsted v. Gregoire*, 841 F. Supp. 1068, considered the concept of "qualifications" in a principled way. This Court has, however, resolved numerous challenges to state elections laws that are alleged to burden access to the ballot. See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); *American Party of Texas v. White*, 415 U.S. 767 (1974). In doing so, this Court has, "recognized that, 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Anderson*, 460 U.S. at 788 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Although this Court has noted its concern that ballot access restrictions tend, "to limit the field of candidates from which voters might choose," *id.* at 786, it has held that, "[n]evertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Id.* at 788.

Those who would challenge ballot access measures designed to encourage rotation in office encounter a natural temptation to regard as a "qualification" any measure that might affect opportunities to serve in office. This temptation is understandable in light of the virtually universal holding that such restrictions (or even absolute term limits) satisfy the more

traditional First and Fourteenth Amendment analysis of state elections laws. *Miyazawa v. City of Cincinnati*, 825 F. Supp. 816 (S.D. Ohio 1993); *U.S. Term Limits*, 872 S.W.2d 349; *Legislature v. Eu*, 286 Cal. Rptr. 283, 816 P.2d 1309 (Cal. 1991), *cert. denied*, 112 S. Ct. 1292 (1992); *Maddox v. Fortson*, 172 S.E.2d 595 (Ga. 1970); *West Virginia ex rel. Maloney v. McCartney*, 223 S.E.2d 607 (W. Va.), *appeal dismissed sub. nom.*, *Moore v. McCartney*, 425 U.S. 927 (1976). As the cited cases illustrate, many states have long pursued the policy of limiting the terms of certain state officers, particularly their governors. Since there is no principled reason to distinguish federal from state officers under the First and Fourteenth Amendments, those who would challenge reform measures such as Amendment 73 are forced to rely primarily upon the Qualifications Clauses, in the hope that the latter clauses might support a different result. If they are to succeed, they must either develop a theory rooted in the distinct nature of federal office, or argue that all previous courts to review state officer term limits have incorrectly ruled.⁴

This temptation to mix legal concepts raises the specter of unleashing a new set of challenges to state elections laws, based upon the unexamined premise that restrictions on ballot access constitute "qualifications for office." The District Court decision in *Thorsted* illustrates this danger. In that case, after noting that the Qualifications Clauses raise a different standard than do the First and Fourteenth Amendments, the court relied virtually exclusively upon First and Fourteenth Amendment cases

⁴ Either proposition invites this Court to establish a rule that would seriously impinge on the states' ability to enact systemic incumbency reform. "The universal authority is that restriction upon the succession of incumbents serves a rational public policy and that, while restrictions may deny qualified men an opportunity to serve, as a general rule, the overall health of the body politic is enhanced by limitations on continuous tenure." *Miyazawa*, 825 F. Supp. at 822 (quoting *Maloney*, 223 S.E.2d at 611).

to support a conclusion that a ballot access restriction imposed a qualification. *Thorsted*, 841 F. Supp. at 1079-81.⁵

If, in this case, Amendment 73 is determined to impose a qualification, without a careful examination of what a qualification entails, the temptation to future litigation over settled issues will prove irresistible. This Court has developed a thorough and cogent framework for the constitutional scrutiny of ballot access cases. It should not now transform the previously dormant Qualifications Clauses into a skeleton key, with which to unlock all state ballot access legislation.

⁵ The curious feature of the *Thorsted* court's use of Fourteenth Amendment ballot access principles derived from the rule of *Anderson v. Celebrezze*, 460 U.S. 780, is that the district court concluded that these principles, consistently applied by both state and federal courts to uphold even out-and-out term limits as to state offices, somehow chemically react with the Qualifications Clauses to produce the opposite result for federal offices. Two unrelated constitutional lines of analysis are combined to yield a result which would not follow from either line taken alone.

If a statute makes the candidate who receives the most votes the winner of the election, it does not establish a qualification. If the complaint, as here, is not that the winner isn't entitled to serve, but rather that the statute makes winning too difficult, then the question is not whether a qualification is established; rather, it is whether the statute violates the plaintiffs' rights under the First and Fourteenth Amendments, as defined by *Anderson* and its progeny. *Anderson*, 460 U.S. at 789. To the extent such issues may be raised in this action, Amicus Washington commends to the attention of this Court the cogent analysis of the Supreme Court of California. *Legislature v. Eu*, 816 P.2d 1309, 1322-29.

B. Amendment 73 Imposes No Qualifications For Office

The Arkansas Court invalidated Amendment 73 based upon the views that it imposed a qualification for office, and that states may not impose additional qualifications.⁶ *U.S. Term Limits*, 872 S.W.2d at 356-57. The first portion of this inquiry requires a working definition of the term "qualification."

The Court of Appeals for the First Circuit has formulated a clear test for determining whether a state statute imposes a qualification. *Hopfmann v. Connolly*, 746 F.2d 97 (1st Cir. 1984), *vacated on other grounds*, 471 U.S. 459 (1985), *opinion on remand* 769 F.2d 24 (1st Cir. 1985), *cert. denied*

⁶ Other parties and amici will address the second part of this two-part inquiry, in which the court below concluded that states may not add qualifications to those stated in the Qualifications Clauses. It worth briefly noting, however, that this Court has recently clarified a key argument employed in *Powell* to support the conclusion that the enumerated qualifications are exclusive, in a manner that calls into question its application in *Powell*. The Qualifications Clauses are phrased negatively, in a manner suggestive of an intent merely to describe minimum qualifications rather than an exclusive list. This Court in *Powell* dismissed the significance of this phrasing, reasoning in part that the redrafting of the provisions in the Constitutional Convention's Committee on Style cannot be given substantive effect. *Powell*, 395 U.S. at 538-39. This Court more recently applied that argument to conclude that to dismiss the significance of the phrasing finally chosen for the Constitution, "would constrain us to say that the second to last draft would govern in every instance" *Nixon v. United States*, 506 U.S. ___, 113 S. Ct. 732, 737 (1993) (emphasis by the Court). The Court's reasoning in *Nixon* therefore invites a re-examination of the conclusion that negative phrasing of the Qualifications Clauses does not demonstrate an intent to list minimum requirements, instead of an exclusive list.

479 U.S. 1023 (1987). As the court there stated, "[T]he test to determine whether or not the 'restriction' amounts to a 'qualification' within the meaning of Article I, Section 3, is whether the candidate 'could be elected if his name were written in by a sufficient number of electors.'" *Id.*, 746 F.2d at 103 (quoting *State ex rel. Johnson v. Crane*, 197 P.2d 864, 871 (Wyo. 1948)). The court used this standard to uphold a Massachusetts statute restricting access to the primary election ballot to candidates attaining a certain percentage of the vote in a state party convention. *Id.* If the court's decision had been otherwise, the Qualifications Clause would have thereby been transformed into a universal solvent of state ballot access statutes, without regard to this Court's previous analysis under *Anderson* and its progeny.⁷

The Court of Appeals for the Eleventh Circuit has now adopted this definition of a "qualification" as well. *Public Citizen, Inc. v. Miller*, 992 F.2d 1548 (11th Cir. 1993), *aff'g* 813 F. Supp. 821 (N.D. Ga. 1993). The appellate court there adopted the opinion of the trial court. The district court held that Georgia's requirement of a run-off election if no candidate at the general election receives a majority is not a qualification for office, relying upon the *Hopfmann* test. *Public Citizen*, 813 F. Supp. at 832. A statute does not establish a qualification unless it "wholly disqualifies" a candidate who does not satisfy it. *Id.*

There is no such thing as a "partial qualification." Unlike the standard for First and Fourteenth Amendment review

⁷ Certainly there is a distinction between a complete bar to election and a mere "strong practical deterrent to election." *Stack v. Adams*, 315 F. Supp. 1295, 1298 (N.D. Fla. 1970). The voters of Washington may have perceived this distinction, when they adopted the measure at issue in *Thorsted* after rejecting, one year earlier, an initiative providing for absolute term limits.

under *Anderson*, the Qualifications Clauses do not trigger a balancing test. A statute either imposes a qualification or it does not. It therefore follows that a statute that allows a successful candidate to take office does not "wholly disqualify" that candidate, even if other issues under other constitutional provisions remain. *Public Citizen*, 813 F. Supp. at 832.

In *Joyner v. Mofford*, 706 F.2d 1523 (9th Cir.), cert. denied, 464 U.S. 1002 (1983), the Court of Appeals upheld an Arizona statute which required certain holders of Arizona state office to resign their state positions before running for certain other offices, including federal office. *Id.* at 1531. The court upheld the "resign-to-run" provision and distinguished it from a line of cases involving state statutes which actually barred certain candidates from seeking federal office. *Id.* at 1529. As the court noted, the Arizona statute "does not impose a fourth qualification on candidates for Congress because it does not prevent [any candidate] from running for federal office." *Id.* at 1531. Like the Arizona statute in *Joyner*, Amendment 73 regulates aspects of election to federal office, but does not bar service by any successful qualified candidate. Arizona merely sought to regulate the conduct of its own state officeholders by denying them a chance to seek federal office while simultaneously retaining their state office. *Id.*⁸

This view of the Qualifications Clauses is also consistent with the ordinary meaning of the word, "qualification." BLACK'S LAW DICTIONARY (6th ed. 1991) defines "qualification" as "[t]he possession by an individual of the qualities, properties, or circumstances, natural or adventitious, which are inherently or legally necessary to render him eligible to fill an office or to perform a public duty or function." The three constitutional qualifications for either House of the United States Congress meet this dictionary definition in that they state "qualities,

⁸ As a corollary, Amendment 73 imposes no qualifications for office because it does not render any long-term incumbent ineligible for appointment to fill a vacancy.

properties, or circumstances" -- age, residency, and citizenship - which any person must possess in order to serve in Congress.

Amendment 73 adds no additional "qualities, properties, or circumstances" for federal office in addition to those contained in the United States Constitution. It does not purport to redefine as "unqualified for office" any category or subclass of person who meets the three constitutional qualifications. Although the amendment denies access to the printed ballot for certain long-term incumbents, even these incumbents, should they win the most votes through a write-in campaign, are fully eligible to serve in the office to which they have been elected. *U.S. Term Limits*, 872 S.W.2d at 357. The amendment does not purport to revoke the qualifications of any candidate for office; rather, it promotes rotation in office among those who meet the constitutional qualifications.

The Court of Appeals for the Tenth Circuit has held that, "there will be instances in which a candidate for elective office may constitutionally be limited to a write-in candidacy." *Skeen v. Hooper*, 631 F.2d 707, 711 (10th Cir. 1980). The court relied upon *Jenness v. Fortson*, 403 U.S. 431, 434 (1971), in which this Court distinguished between statutes that bar a candidacy completely and those that allow write-in voting. In *Skeen*, an incumbent Member of Congress died shortly after winning the Democratic primary for an additional term. No Republican had filed for the office. *Id.* at 708. The court upheld a New Mexico law that allowed the Democrats, but not the Republicans, to select a new nominee through the state central committees. The court held that, under the circumstances, the opportunity to wage a write-in campaign afforded sufficient opportunity to the Republican candidate. *Id.* at 711-12.⁹

⁹ Significantly, the plaintiff in that case, Joe Skeen, won that election as a write-in candidate. M. Barone and G. Ujifusa, *THE ALMANAC OF AMERICAN POLITICS* 1994, 847. Representative Skeen is but one example of individuals who have successfully

Courts construing the Qualifications Clauses have applied this view of what constitutes a qualification. For example, the Maryland Court rejected the contention that requiring a candidate to designate a campaign treasurer constituted a qualification for office. *Secretary of State v. McGucken*, 222 A.2d 693 (Md. 1966). The court reasoned that since the requirement "has no bearing on the eligibility of a candidate for office," it cannot constitute a qualification within the meaning of Article I, Section 2. *Id.* at 697.

The Nebraska court held that a state law limiting ballot access, "in no manner seeks to add other qualifications." *State ex rel. O'Sullivan v. Swanson*, 257 N.W. 255, 256 (Neb. 1934). The Nebraska statute at issue denied an unsuccessful primary candidate for governor the ability to appear on the ballot in the general election as a candidate for U.S. Senate. The court held this statute not to impose a qualification because of the possibility of running as a write-in. *Id.* at 255-56.

Even cases finding fault with state election statutes based on the qualifications clause have done so only when the state statute expressly prohibited a candidate from taking office. *See, e.g., Lowe v. Fowler*, 240 S.E.2d 70 (Ga. 1977) (holding inapplicable to federal office a prohibition in the Atlanta City Charter against the president of the city council qualifying for other elective office); *Opinion of the Judges*, 116 N.W.2d 233 (S.D. 1962) (holding inapplicable to federal office the prohibition against the Governor or Lieutenant Governor of South Dakota

sought office by write-in. *Id.* at 202-03, 1143 (reciting other examples of write-in success by current members of Congress). These successful candidates have in common a well-known record and high name recognition prior to running as a write-in. These are precisely the characteristics one might expect of a long term incumbent affected by Amendment 73. These advantages are set forth more fully in the Affidavit of former Congressman William Frenzel, filed in the related *Thorsted* case and appended to this brief for the Court's reference.

becoming eligible to any other office during the term for which elected); *State ex rel. Wettengel v. Zimmerman*, 24 N.W.2d 504 (Wis. 1946) (holding a state court judge—the Honorable Joseph R. McCarthy—eligible to seek election to the United States Senate); *State ex rel. Chandler v. Howell*, 175 P. 569 (Wash. 1918) (holding that the ineligibility of judges to other offices, as specified in Article IV, Section 15 of the Washington Constitution, does not apply to federal office).

In all cases, courts have construed state statutes that allow the winner to serve in office not to constitute qualifications to office. The possibility of attaining re-election by write-in precludes a determination that Amendment 73 imposes a qualification.¹⁰ Assertions that the state law places some candidates at a competitive disadvantage are properly analyzed under the First and Fourteenth Amendments instead. *See, e.g., Joyner*, 706 F.2d at 1531-33. Amendment 73 does not question the legal entitlement of a successful candidate to a Certificate of Election and to hold office. It therefore imposes no qualifications for office.

¹⁰ The district court in *Thorsted* equated write-in votes for established, well-known, and experienced long-term incumbents with the past experience of write-in votes cast for obscure or fringe candidates, and asserted: "Denial of ballot access ordinarily means unelectability." *Thorsted*, 841 F. Supp. at 1081 (emphasis added). The district court ignored the undeniably unordinary prospect of major candidates seeking write-in votes.

Although winning a campaign by write-in is more difficult than by having one's name on the ballot, candidates with high name recognition, of which long-time incumbents will almost always be examples, can mount successful write-in campaigns. In this regard, the Court should disregard statistics based primarily on write-in campaigns conducted by under-financed, last-minute fringe candidates, who historically account for the great majority of write-in campaign activity.

C. Rotation in Office Measures are Designed for Broad Effect on the Election System Over Time, and Do Not Change the Qualifications for Office.

To fully assess the intended and actual effects of laws such as Amendment 73, the Court must look beyond its effect on any single election. Those who would challenge the initiative under the Qualifications Clauses argue from a "snap-shot" of the effect of the law on a particular candidate in a particular election -- the long-term incumbent turned away by the elections official upon an attempt to file candidacy papers.

It is ironic to read Initiative 573 as rendering such a candidate "unqualified" for office. Indeed, such a candidate is obviously considered highly "qualified," because he or she has achieved election to the office not once, but several times. Contrasted with a single "snap-shot" of the candidate barred from the ballot at a point in time, a series of time-lapsed photographs of the candidate's political career, would reveal a candidate who in the past has been viewed as fully qualified, so much so that the voters have repeatedly elected the candidate to office. Even at present, the candidate may seek re-election by write-in, and serve additional terms if successful.¹¹

This "time-lapse" approach shows that Amendment 73, and laws like it, are not intended to establish qualifications for the offices they affect. Their intent is not to close the office to people meeting the constitutional qualifications, but to open the office up to more of the people who meet those qualifications. To achieve that end, they encourage (but do not absolutely require) long-term officeholders to yield their positions to other qualified candidates from time to time, thus opening up the

¹¹ Additionally, in many states, including Washington, the candidate may again be placed on the ballot after a specified number of years have lapsed since last holding the office. Wash. Rev. Code §§ 29.68.015 and .016.

position to a greater number of people and mitigating the perceived evils of long-term incumbency.

This Court took the longer "time-lapse" view in *Storer v. Brown*, 415 U.S. 724 (1974). That case involved a challenge to a California statute denying ballot access to those seeking election to office less than one year after changing their party affiliation. The statute in question applied to federal as well as to state offices. A "snap-shot" taken at filing time might have revealed a candidate who, while meeting all three constitutional qualifications for federal office, was not allowed to file. However, the Court specifically rejected a Qualifications Clause argument (terming it "wholly without merit"), *id.* at 746 n.16, analyzing the California statute instead (and upholding it) under the First and Fourteenth Amendment standards of equal protection, due process, and freedom of association.

II. THE CONSTITUTION RESERVES TO THE STATES PLENARY AUTHORITY (SUBJECT TO CONGRESSIONAL OVERRIDE) OVER THE CONDUCT OF ELECTIONS.

The Constitution reserves to the states broad authority to regulate the conduct of Congressional elections. U.S. Const. art. I, § 4. A challenge to state authority in this area therefore raises broader questions regarding the role of the states in a federal system. The analysis of state laws encouraging rotation in office must therefore take place within the larger context of reserved state authority to conduct elections.

The Elections Clause reserves plenary authority to the states over the conduct of elections, including federal elections, subject to possible Congressional override. The Constitution provides:

The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by

Law make or alter such Regulations, except as to the Places of choosing Senators.

U.S. Const. art. I, § 4, cl. 1.

The Constitution therefore leaves to the states the design of elections systems, including those for Senators and Representatives. The states are free to vary from each other in their preferred methods, subject only to the possibility of Congressional override if the latter body affirmatively finds a need for greater uniformity. Absent such an active Congressional determination, the states retain plenary authority, subject only to the same general review under other constitutional provisions to which all state legislation is subject.

A. The Constitution Does Not Establish Uniform National Rules for Elections.

Lower court decisions invalidating rotation in office provisions have proceeded from the assumption that all fifty states must be uniform in their manner of representation in Congress. *U.S. Term Limits*, 872 S.W. 2d at 356. They have assumed that the selection process for all federal officers must be the same. *Thorsted*, 841 F. Supp. at 1082-83. Absent a Congressional determination to apply a contrary view in a particular context, an assumed mandate for uniformity directly contradicts the theoretical underpinnings of federalism and dual sovereignty. See, *Gregory v. Ashcroft*, 501 U.S. ___, 111 S. Ct. 2395, 2399-2403 (1991).

The Elections Clause states explicitly the concepts of federalism and dual sovereignty implicit in the Constitution as a whole. It first reserves broad authority to the states, and then provides for Congressional override as the exception (and not the general rule) when Congress finds a specific need. U.S. Const. art. I, § 4, cl. 1. Judicial imposition of mandatory uniformity, where Congress is silent, reverses these textual, constitutional priorities.

As a general rule, States are autonomous with regard to elections. *United States v. Classic*, 313 U.S. 299, 319 (1941). This state control is, "subject only to such minimum regulation as [Congress] should find necessary to insure the freedom and integrity of the choice." *Id.* at 319-20.

The relative roles of the states and Congress regarding elections are therefore precisely the opposite of their respective roles under the Commerce Clause. U.S. Const. art. I, § 8. In what has come to be called the "negative" or "dormant" Commerce Clause doctrine, this Court has explained that, "even without implementing legislation by Congress [the Commerce Clause] is a limitation upon the power of the States." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977). The Commerce Clause is therefore viewed as affirmatively creating a national rule of uniformity, against economic protectionism by states. *Wyoming v. Oklahoma*, 502 U.S. ___, 112 S. Ct. 789, 800 (1992).

The Elections Clause textually establishes the opposite, however. While the Commerce Clause is viewed as promoting national uniformity, even when Congress is silent, the Elections Clause reserves authority to the states, unless Congress determines uniformity to be necessary. Except where Congress affirmatively opts for national uniformity, the Elections Clause allows the states to adopt their own systemic views of representation and the electoral process.

The framers therefore can not have regarded uniformity as the, "one watchword for representation of the various states in Congress," *U.S. Term Limits*, 872 S.W.2d at 356, because they did not draft an elections clause at all akin to the Commerce Clause. The framers would not have drafted an elections clause reserving primary authority to the states if they viewed Congressional elections as, in this Court's classic description of interstate commerce, "in their nature national, or admit[ting] only of one uniform system" *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1852).

At the time of ratification, proponents of the Constitution explained the Elections Clause in precisely this way. At the Virginia ratifying convention, James Monroe inquired of James Madison why Congress was afforded a role in federal election regulation at all. Madison explained:

It was found necessary to leave the regulation of these, in the first place, to the State Governments, as being the best acquainted with the situation of the people, subject to the control of the General Government, in order to enable it to produce uniformity, and prevent its own dissolution.

2 THE DEBATE ON THE CONSTITUTION 693-94 (Library of America, 1993). In Madison's view, therefore, uniformity is not an automatic rule, but an exception to the general rule of state discretion.

The debate at the North Carolina ratification convention also illustrates the framers' understanding that the Constitution would not mandate a uniform approach to federal elections. Responding to the objection that the Constitution would "take away that power of selections, which reason dictates [the states] ought to have among themselves," 2 *id.* at 854, James Iredell (later a Justice of this Court), concluded that Congress would declare uniform rules only as exceptions to a general rule of state control, where specific circumstances dictated. 2 *id.* at 856-57.¹²

¹² Several states included within their resolutions ratifying the constitution, the understanding that states would retain primary authority over elections, with federal uniformity but a rare necessity. 2 *id.* at 548 (Massachusetts); 551 (New Hampshire); 554 (Maryland); 564 (Virginia); and 573 (North Carolina).

The Arkansas court therefore erred in viewing "uniformity" as a general governing principle of federal elections. The general rule is state autonomy, although Congress may determine that certain practices must be general where the national interest so requires. Madison explained, with particular regard to federal elections, "The State Governments may be regarded as constituent and essential parts of the federal Government." 2 *id.* at 103 (Federalist 45). The authority reserved to them in the first instance by the Elections Clause merely reflects the nature of federalism.

The collective state practice over the past two hundred years has reflected this general rule of diversity. States have structured their electoral practices, including those related to federal office, in diverse ways. See *Libertarian Party of Washington v. Munro*, No. 92-36620, slip op. 7671, 7686 (9th Cir., July 14, 1994) (noting that states have adopted widely divergent systems for conducting elections and determining ballot access). Whether subtle or dramatic, the very concept of state regulation will affect ballot access differently in different states. Even so, this Court does not mandate a strict uniformity in the face of Congressional silence. Compare *Munro v. Socialist Workers Party*, 479 U.S. 189, 191-92 (1986) (describing Washington's practice of placing minor party candidates on the general election ballot only if they first secure a small number of petition signatures, and then garner 1 percent of the vote at the primary), with *Jenness v. Fortson*, 403 U.S. 431, 432 (1971) (describing Georgia's practice of requiring petition signatures amounting to five percent of the number of registered voters).

The broad authority retained by the states under the Elections Clauses encourages a healthy diversity of political structure and innovation. In the frequently recited metaphor of Justice Brandeis, the states may serve as laboratories for the nation. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The concept of representation can be complex, and over time has been subject to differing views. Willi Paul Adams, *THE FIRST AMERICAN CONSTITUTIONS* 230-55 (1980) (reciting the various ways in

which the concept of democratic representation can be understood). The fact that these varying approaches might lead to different results in different states does not mean that they violate the constitutional scheme.

This Court applied this view in *Oregon v. Mitchell*, 400 U.S. 112 (1970). "In short, the Constitution allotted to the States the power to make laws regarding national elections, but provided that if Congress became dissatisfied with the state laws, Congress could alter them." *Id.* at 123 (opinion of Black, J.).¹³ Justice Black wrote on behalf of a 5-4 majority that "the framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Id.* at 124-25 (footnote omitted). Therefore, except where Congress determines a uniform rule to be necessary, the states may establish their own comprehensive elections systems.

B. State Authority Over Elections Structures is Plenary.

The state authority preserved by the Elections Clause (subject to affirmative override) is plenary in nature. It extends not only to narrow procedural questions, but to all aspects of the elections process. Those who would oppose rotation in office measures such as Amendment 73, therefore, may not prevail by arguing that the states' authority under Article I, Section 4 is limited to such matters as the hours of polling place operation or the color of ballot envelopes. "Words, especially those of a constitution, are not to be read with such stultifying narrowness." *Classic*, 313 U.S. at 320.

The Elections Clause provides the states with broad authority to regulate all aspects of the election process, limited

¹³ In that case, differently-constituted majorities of this Court held that Congress could enact a uniform national voting age for federal elections, but could not do so for state elections. *Id.* at 117-18 (opinion of Black, J.).

only by other express provisions of the Constitution or by preemptive federal legislation. "It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections" *Smiley v. Holm*, 285 U.S. 355, 366 (1931). The states possess the authority, "in short, to enact the numerous requirements as to procedures and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Id.*

This state authority will almost inevitably extend to the state's views of the systemic nature of representation. National concerns in this regard may be reflected in Congressional enactments under Section 4. Short of this, "Nothing in the original Constitution controlled the way the States might allocate their political power, except for the guarantee of a Republican Form of Government, which appears in Art. IV, § 4." *Oregon v. Mitchell*, 400 U.S. at 155-56 (opinion of Harlan, J.).

As this Court has previously noted, "the States have evolved comprehensive, and in many respects complex, elections codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualifications of candidates." *Storer*, 415 U.S. at 730.

Previous decisions have illustrated the comprehensive nature of state authority. This authority is not limited to a narrow construction of "time, place, and manner." *See, Anderson*, 460 U.S. at 788. The "manner" of elections extends broadly to the power to structure electoral systems comprehensively. *Classic*, 313 U.S. at 316, 320. This Court has also recognized the autonomy of the states over the very structure of the electoral system, including division of decisions

between primary and general elections. *Munro*, 479 U.S. at 196.¹⁴

The state of Arkansas exercised this plenary authority by enacting Amendment 73. Unless Congress affirmatively determines that state law provisions encouraging rotation in office must be subject to a uniform rule (whether by overriding such laws or by replacing them with a similar nationwide plan), Arkansas' action complies with the states' federal role in administering elections and charting its own policy regarding representation in Congress.

CONCLUSION

The role of the individual states as dual sovereigns within our federal system has been among the most frequent themes of constitutional jurisprudence. Article I of the Constitution reserves to the states the primary authority over the election of Senators and Representatives. States may exercise this authority by adopting measures designed to encourage rotation in office among members of the delegation to Congress from each state. The Constitution imposes no mandate of uniformity as to how each state, and its citizens, must view their representation in Congress. Absent an affirmative determination by Congress that a uniform federal rule is necessary, the states remain free to adopt their own unique systems for conducting elections and determining representation.

State laws affecting the likelihood of victory by some candidates do not thereby impose qualifications for office. Amendment 73 in no way prevents the candidate receiving the most votes from taking office. To regard a measure that may affect the probabilities as to the outcome of an election as a "qualification" is to contradict the normal understanding of the

¹⁴ The structure of an electoral process may affect the ultimate choice of the voters. See, James M. Buchanan and Gordon Tullock, *THE CALCULUS OF CONSENT* (1962).

term. To the extent the challengers to this measure seek to establish a constitutional impediment, they must look instead to this Court's established principles of ballot access. Courts applying such principles have generally upheld measures designed to encourage rotation in office.

For those reasons, this Court should reverse the judgment of the Supreme Court of Arkansas, and uphold the constitutionality of Amendment 73.

Respectfully submitted,

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IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SUSAN THORSTED, et al.,)
)
Plaintiffs,) No. C92-1763WD
v.) No. C93-770WD
)
CHRISTINE O. GREGOIRE,)
et al.,)
)
Defendants,)
and)
)
SHERRY BOCKWINKEL,) AFFIDAVIT OF
et al.,) WILLIAM E. FRENZEL
Intervenor-Defendants.) IN SUPPORT OF MOTION
) FOR SUMMARY JUDGMENT
) OF U.S. TERM LIMITS,
) INC., ET AL.

MARGARET COLONY,)
et al.,)
Plaintiffs)
v.)
)
RALPH MUNRO, et al.,)
)
Defendants,)
and)
)
SHERRY BOCKWINKEL,)
et al.,)
Intervenor-Defendants.)
_____)

DISTRICT OF COLUMBIA, ss.:

William E. Frenzel, being first duly sworn,
deposes and says:

1. I am an adult citizen of the United States and a resident of Virginia. I make this affidavit based on my own knowledge and observation.

2. I am a Guest Scholar in the Brookings Governmental Studies program at the Brookings Institution in Washington, D.C., where I conduct research and lecture on public policy issues, including in particular the need for reform of Congress as an institution. I am also currently the Special Advisor to the President of the United States for the North American Free Trade Agreement.

3. From 1971 to 1991 I served ten consecutive terms as a member of the United States House of Representatives representing the Third District of Minnesota. I chose not to run for an eleventh term, and retired as a member of Congress on January 2, 1991.

4. Prior to my Congressional service, I had been a member of the Legislature of the State of Minnesota for eight years.

5. During the time I was a member of the House of Representatives, I served as the Ranking Minority Member of the House Budget Committee. I also served on the Ways and Means Committee of the House of Representatives, and on its Subcommittee on Trade.

6. During the period 1971-1989 I also served on the House Administration Committee, of which I became the Ranking Minority Member. That committee has responsibility for election laws, and while serving on it I became very familiar with the provisions and effects of existing election laws, as well as the changes in election laws that occurred during that period.

7. In the course of my years on the House Administration Committee, and based upon my own research since that time, I have found no instance in history in which a legislative body or parliament changed election laws in such a way as to lessen the chances of election for incumbents, or to improve the election opportunities for challengers. The practice in such bodies, including the House of Representatives, is for incumbents to devise institutional structures and systems that favor incumbents.

8. In the course of my years on the House

Administrative Committee, I participated in several enactments that changed the federal election laws. These included new disclosure requirements, new campaign financing restrictions, and creation of the Federal Election Commission. I observed that none of these changes lessened the great advantages of incumbents in the electoral process. In fact, some of the changes increased the power of incumbents -- such as, for example, campaign spending or contribution limitations that by setting equal dollar amounts can prevent challengers from spending more to become known to voters and to overcome their disadvantage in name recognition.

9. During my twenty years as a Member of the House of Representatives, I constantly observed the many advantages incumbents hold over all other candidates. These include fundraising, name recognition and many taxpayer-financed perquisites. I observed that incumbent Representatives are rarely defeated, and long-term incumbents almost never.

10. Congressional incumbents can exploit the perquisites of office to increase their visibility and favorable recognition in their home districts. Members of Congress receive taxpayer-financed salary, travel, office, staff, and

communication allowances. Incumbents can prolong their incumbency through patronage, pork-barrel projects, name recognition and voter inertia.

11. Many advantages of incumbents are taxpayer-funded and legally sanctioned. One such advantage enjoyed and used by incumbents is the franking privilege, which allows them to blanket their districts with self-promoting mail at taxpayer expense. Not only does this allow incumbents to make mass mailings to every voter, at no expense to themselves. In addition, in recent years incumbents have also been able to use particularized mailing lists, generated at taxpayer expense, to send personalized first-class franked letters to voters with particular interests or backgrounds, even though those voters never communicated with them or sought such mailings.

12. Another enormously important taxpayer-financed advantage that has been used by incumbents more and more over the years is taxpayer-financed media facilities and distribution. These permit incumbents to receive free and frequent publicity on radio, television and cable broadcasts. The House of Representatives has a sophisticated recording studio, for use of members only, to prepare tapes of speeches and messages to

voters. Taxpayers pay for the facilities, the personnel that run them, the production costs, and the costs of distributing, by mail or otherwise, the tapes that members supply (from their taxpayer-funded expense accounts). These messages are widely disseminated by broadcasters, who can use them to fill air time at no cost to themselves. Such messages have become particularly widespread on cable stations, which are an increasingly large share of the television market.

13. Members of the House are given large staffs, paid by the taxpayers. Generally the staff members come from a political background. The activities of these staff members in, for example, press contacts and constituent case work, serve to promote the re-election of the member. These staff personnel also participate in campaigns, with no effective check on how much of that activity occurs on government-paid time, and no clear line between legislative and political duties. Taxpayers also pay for staff travel, which often includes political aspects.

14. Besides taxpayer-paid offices in Washington, members may have offices in their districts. All the costs of those offices -- rental, furniture, fixtures, telephones, other communications equipment, and staffs -- are borne by the

taxpayers. Members also receive an allowance for frequent government-paid travel to and from their districts.

15. Representatives and Senators have the ability to enhance their status with constituents by focusing on constituency service, or "casework," activities. With control over higher budgets and program authorizations, Representatives and Senators also possess the power to expedite and influence bureaucratic decisions, and take credit for them when they are favorable to constituents.

16. The institutional structure and political processes of Congress also provide significant benefits for incumbents, largely because of the Congress' seniority system. The longer a legislator stays in office, the more seniority he accumulates, and the more power he wields through the congressional caucus and on substantive committees. Under the seniority system, junior members who perform as the long-term incumbents desire can expect to be rewarded when they become long-term incumbents themselves. There is no practical way to escape the system when members stay in the House for literally decades. Also, in recent years the House has created so many subcommittee chairmanships that members soon reach modest

positions of power or are on the verge of ascending, so that after a few years they have a vested interest in the seniority system. Legislative careerism has decimated congressional accountability to the people.

17. In addition to and related to the taxpayer-financed and institutional advantages of incumbents, Members of Congress also have a distinct advantage in elections simply because of their status as Members of Congress. For example, because they are Members of Congress, incumbents are often sought after by the media for interviews and television appearances. This enormous access to the media greatly influences their re-election success. They also have taxpayer-funded expense accounts, for frequent press releases and press conferences, and taxpayer-paid press secretaries and press aides to arrange such events. They are often invited to use public buildings both in Washington, D.C. and in their districts to hold such events. All this constant publicity costs the incumbent nothing.

18. The greater fundraising abilities of incumbents enable them vastly to outspend their challengers. This gap between incumbents and challengers has widened over time. In

the 1974 campaign season, for example, the average House incumbent spent \$56,539, roughly 41% more than the \$40,015 spent by the average challenger. But in the 1988 campaign, House incumbents were able to raise campaign funds so disproportionately that they spent an average of \$378,316, a 314% advantage over the average challenger. See Exhibit 1.

19. All of these advantages -- free mailings, free media access, the ability to perform constituent service and to bring favored projects to their constituents, and the ability to raise large amounts of money -- not only permit Members of Congress to present themselves in a favorable light, but also enhance their name recognition. Political consultants emphasize, and my own observation confirms, that unless there is some overriding issue in a particular year, many voters tend to vote for a name that is familiar to them.

20. These and other advantages of incumbency thus make it nearly impossible for a challenger to defeat a congressional incumbent. In the years preceding the enactment of Initiative Measure 573 in the State of Washington, 98.5% of incumbent House members seeking re-election were re-elected in 1986, 98.5% in 1988, and 96.3% in 1990. Similarly, in the

United States Senate, 75% of incumbents seeking re-election were re-elected in 1986, 85.1% in 1988, and 96.9% in 1990. See Exhibit 2. The only drops in re-election rates, slight ones, tend to occur in the years following decennial redistricting, such as 1992. In such situations, new district lines may force one incumbent to run against another or place them in an unfamiliar constituency. Even so, the re-election rate remains extraordinarily high. In 1992, 86% of incumbent House members seeking re-election were re-elected, and 82% of Senate incumbents seeking re-election were re-elected. See Exhibit 3.

21. These results evidence and continue a pattern of electoral security for members of Congress. In the twenty-one elections from 1950 to 1990, the re-election rate for incumbents fell below 90% only in 1958, 1964, 1966, and 1974. See Exhibit 4. These re-election rates for incumbents are in marked contrast to those of the Nineteenth Century. Biennial turnover in the House of Representatives was greater than 40% for the most of the years preceding 1900. It has not approached that level since 1896, and was as low as 7.6% in 1988. See Exhibit 5.

22. Ease of re-election leads to prolonged

incumbency. In Washington, Thomas Foley was elected to the 89th Congress on November 3, 1964, and has been re-elected to each succeeding Congress. Representative Jamie Whitten has been re-elected to the House for more than fifty years. Representative John Dingell has been re-elected to the House for thirty-eight years. Representative Dan Rostenkowski has been re-elected to the House for thirty-four years. Senator Bob Dole has been re-elected to the Senate for twenty-four years. Similarly, Senators Strom Thurmond and Robert L. Byrd have been re-elected to the Senate for thirty-eight and thirty-four years, respectively. Many similar examples could be given.

23. My observation and belief, based upon my many years of experience in and around the Congress of the United States, is that discouraging long legislative incumbency, by ballot-access restrictions and by term limits if necessary, is a reform essential to the assurance of a meaningfully representative government in the United States. The power of incumbency for elected officials, particularly those of the Congress of the United States, has become so great as to drown out alternative political voices and diminish responsiveness of those who are supposed to be the people's representatives to the people.

24. Laws that simply restrict ballot access and allow a candidate's name to be written in would not automatically prevent re-election of incumbents. In modern times, representatives Thomas D. Alford of Arkansas, Joe Skeen of New Mexico, and Ron Packard of California all were elected to the House of Representatives by write-in votes. And the write-in election of Senator Strom Thurmond to the United States Senate confirms that ballot restrictions are not an absolute bar to election, particularly for politicians who have already achieved name recognition among the voters. See Exhibit 6.

25. Discouraging long congressional incumbency can be expected to result in more competitive elections, which will force elected representatives to be more responsive to the concerns of their constituents and increase congressional accountability. Legislation to discourage or prohibit long-term incumbency will induce Members of Congress to become less concerned with trying to build careers as professional legislators, and thus less susceptible to special-interest influence. Such laws may also minimize the influence of campaign money on incumbents. Special-interest groups' and lobbyists' influence may be expected to decrease accordingly.

26. Assuring a circulation of membership through discouraging or restricting incumbency also will provide a regular infusion of new ideas and facilitate the breaking of legislative paralysis. It will allow more citizens to serve in Congress and reduce some of the advantages of incumbency. It will also eliminate the pervasive and undemocratic rule of seniority, whereby the House Speaker and chairmen of important committees have been elevated. Frequent turnover would leave Congress little choice but to elect its leaders democratically, on the basis of the policies and leadership qualities of the candidates. Based on my observation, both in the Minnesota legislature and the House of Representatives, it is not essential for a representative to have a long service in order to do an effective job of representing constituents. The principal obstacle to new members is the seniority system, which itself depends on long incumbency and would collapse without it. More importantly, Members of Congress who spend year after year in the federal capital are likely less and less to reflect the thinking and consensus of the people whom they are supposed to represent.

27. In 1971 I introduced a bill for a federal law that

would limit congressional incumbency. I introduced similar bills in successive Congresses. None received significant support from the Members of the House. During my years of Congressional service, I observed that many such bills were introduced, but died quickly without debate. In fact, to my knowledge, only one such bill has been allowed to reach the floor of the House and to be voted upon. That occurred in 1947. The bill received only one vote, that of its sponsor.

28. Yet the polls, and the initiatives usually passed wherever the people have been allowed to vote on the question, all show overwhelming support for term limit laws of various kinds. Nevertheless, Congressional incumbents on issues like this ignore the clear wishes of the people, and vote their own self-interest. In my judgment and observation, they will always do so. Congress can never be expected to take the necessary steps to reform itself. Another example that confirms that self-interest will always override is the line-item veto, for which polls show overwhelming support, but which Congress will not enact because it would limit the institutional power of members.

29. The refusal of Representatives and Senators to support limits on incumbency confirms that the voters have no

other recourse than to do so themselves by enacting restrictions that discourage or prohibit legislative incumbency. My personal belief, based upon my experience in Congress, is that limits on long-term incumbency, although such incumbency was never intended by the Framers of our government, must come from the voters, for it will not come from the Congress itself.

30. Attached as Exhibit 7 is an article dealing with these subjects which I published in The Brookings Review in 1992 before the people of Washington adopted Initiative Measure 573. I continue to vouch for the facts and believe in the opinions expressed therein.

/s/William E. Frenzel
WILLIAM E. FRENZEL

Subscribed and sworn to before
me this 11th day of November 1993:

/s/ Carol P. Halloch
NOTARY PUBLIC

My commission expires:
 1993

19 16
Nos. 93-1456, 93-1828

Arkansas Court, U.S.

FILED

AUG 16 1994

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

U.S. TERM LIMITS *et al.*,
v. *Petitioners*,
RAY THORNTON, *et al.*,
Respondents.

WINSTON BRYANT, in his official capacity as
Attorney General of Arkansas,
v. *Petitioner*,
BOBBIE E. HILL, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of Arkansas

**BRIEF OF THE UNITED STATES
JUSTICE FOUNDATION AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF THE <i>AMICUS CURIAE</i>	1
SUMMARY OF THE ARGUMENT	2
I. AMENDMENT 73 DOES NOT VIOLATE THE QUALIFICATIONS CLAUSE OF THE CON- STITUTION	3
A. Amendment 73 Is Not an Absolute Bar to the Re-Election of a Long-Term Congressman or Senator	3
B. Amendment 73 Is Consistent With Decisions Upholding State Regulation of the Time, Place and Manner of Congressional Elec- tions	10
II. THE APPROPRIATE STANDARD OF RE- VIEW IS THE RATIONAL BASIS TEST	11
CONCLUSION	16

TABLE OF AUTHORITIES

Cases	Page
<i>Bullock v. Carter</i> , 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972)	10
<i>Clements v. Fashing</i> , 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982)	10
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972)	11
<i>Legislature v. Eu</i> , 54 Cal. 3d 492, 816 P.2d 1309 (1991), <i>cert. denied</i> , 112 S.Ct. 1292 (1992)	12, 13
<i>Nordlinger v. Hahn</i> , 112 S.Ct. 2326 (1992)	2
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	10, 11
<i>Thorsted v. Gregoire</i> , 841 F.Supp. 1068 (W.D. Wash. 1994)	6, 7, 8, 9
<i>U.S. Term Limits v. Hill</i> , 316 Ark. 251 (1994)	3, 6, 10, 12
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968)	11
 Constitutional Provisions	
U.S. Constitution, Article I, § 2	3
Article I, § 3	3
Article I, § 4	3, 11
Ark. Const., Amend. 73	<i>passim</i>
Calif. Const., Art. IV, § 1.5	13
 Statutes	
Cal. Election Code, § 25003	13
Cal. Proposition 164, § 2, 1992	15
Wash. Rev. Code § 29.04 180	8
Wash. Rev. Code § 29.68	6
 Miscellaneous	
Congressional Quarterly's Members, 103rd Congress, Senate and House of Representatives	4, 9
Vital Statistics on Congress, 1993-1994 (Congressional Quarterly and the American Enterprise Institute)	5

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INTERESTS OF THE *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, the United States Justice Foundation, a California corporation (the "USJF") submits the following brief *amicus curiae* in support of Petitioners in this action. Written consent to the filing of this brief has been granted by counsel for Petitioners and

Respondents in each consolidated case and such written consents of all parties have been lodged with the Clerk of this Court.

The USJF is a non-profit, tax-exempt California corporation dedicated to the preservation of property, civil and human rights. USJF regularly represents individuals and classes, not only to redress individual acts of injustice, but also to promote important public policy matters. USJF has been active in a variety of issues since it was founded in 1979, including significant developments in the law in the fields of tax limitation and welfare reform. During the Supreme Court's October term, 1991, USJF filed a Motion for Permission to File Brief as Amici Curiae and Brief in Support of Respondents in *Nordlinger v. Hahn*, 112 S.Ct. 2326 (1992), the case in which this honorable Court resolved the constitutionality of the California system of real property taxation.

California enacted a Congressional term limits law, Proposition 164, through the initiative process in 1992. Besides having supporters in Arkansas, USJF has many members, directors and supporters who live and vote in California. Since issues raised in the cases at hand may relate directly to the constitutionality of Proposition 164, USJF has a particular interest in presenting its position in support of Petitioners through this brief *amicus curiae*.

SUMMARY OF ARGUMENT

USJF submits that the Arkansas Supreme Court failed to fully consider the factual and legal implications of the availability of the write-in option for "barred incumbents" seeking re-election to Federal office. If such implications were considered, that Court should have found that "barred incumbents" were not absolutely barred from running for re-election to Federal office. That Court also should have considered Amendment 73's constitutionality as a regulation of the "manner" of elections under Article 1, § 4 of the United States Constitution. If the Court had considered Amendment 73 as a regulation of the

manner of elections, the appropriate constitutional test to apply to the state regulation would have been the rational basis test. The Arkansas Supreme Court received ample evidence to make a determination that the policy behind Amendment 73 has a rational basis, and to find the law as not unconstitutional. In failing to so rule, the Arkansas Supreme Court erred, and should be reversed, and Amendment 73 should be found as not unconstitutional.

I. AMENDMENT 73 DOES NOT VIOLATE THE QUALIFICATIONS CLAUSE OF THE CONSTITUTION.

A. Amendment 73 Is Not an Absolute Bar to the Re-Election of a Long-Term Congressman or Senator.

The Arkansas Supreme Court determined that Amendment 73, a measure directly enacted by the voters of Arkansas, imposed a restriction on a category of candidate's eligibility for a "printed" appearance on a ballot for election to the United States Congress, and that as a result of this restriction a "broad category of persons" was excluded from seeking election to Congress in violation of the Qualification clauses of Article 1, §§ 2 and 3 of the United States Constitution. The Court heard Petitioner's argument that the exclusion was a permissible exercise by the state of the regulatory power of organizing elections pursuant to Article 1 § 4 of the Constitution, and stated,

"... we do not agree, however, that excluding a broad category of persons from seeking election to Congress is a mere regulatory power." *U.S. Term Limits v. Hill*, 316 Ark. 251, 266.

The Supreme Court of Arkansas erred in overstating Amendment 73's reach and underestimating the legal and factual significance of the option available to long-term former and incumbent politicians in Arkansas to be re-elected to Federal office by write-in.

First, the "broad category of persons" seeking election referenced by the Court merits a closer examination. On

the facts, the category of persons identified in Amendment 73 who would be affected by the law is limited to incumbent politicians in Arkansas seeking re-election to the House of Representatives (having served six years) and the Senate (having served twelve years), as well as former office holders who, having reached the relative levels of service, wish to run once again for Federal office.

In any two-year election cycle, there may or may not be a Senate election in Arkansas, given the staggering of elections of Arkansas' two Senators. One of the Senate seats will be up for election in 1998. *Congressional Quarterly's Members, 103rd Congress, Senate*. Arkansas has a total of four members of the House of Representatives. *Congressional Quarterly's Members, 103rd Congress, House of Representatives*. In 1998, for example, if each of these four Congressmen have reached their term limit for purposes of printed ballot status, and *assuming* each of these four, along with the incumbent Senator, will seek re-election, the "broad category of persons . . . seeking election" as referenced by the Court would be a total of five people. This number could of course increase if one or more of Arkansas' retired Members of Congress with the requisite service also decided to seek reelection. Given these facts, it appears that five people may be affected by the law in 1998. Thus, measured by another yardstick, the category is not so broad as stated by the Court.

Perhaps the Arkansas Supreme Court was considering the effect of legislation such as Amendment 73 if implemented by each state or on a national level. In that case, many more incumbent politicians would indeed be affected. While such information is not relevant to the Court's review of the Arkansas law, the national statistics may provide some context for the Arkansas Supreme Court's reference to a "broad category of persons." According to information developed by the Congressional Accountabil-

ity Project ("C.A.P.") of Public Citizen from the publication *Vital Statistics on Congress, 1993-1994*, a joint publication of the Congressional Quarterly and the American Enterprise Institute, pages 20-21, the length of service among the 435 members of the House of Representatives in the current Congress is as follows:

First term:	110
Two terms:	39
Three terms:	38
More than three terms:	248
Total:	435

The mean term of office developed from the statistics was 5.3 years. The median term of office developed from the statistics was 4 years.

As to the Senate, the C.A.P. calculations are as follows:

First term:	30
Two terms:	17
More than two terms:	53
Total:	100

The mean term of office developed from the statistics was 11.3 years. The median term of office developed from the statistics was 12 years.

If applied on a national level, the Arkansas law would have an affect on slightly over half of the compositions of both Houses of Congress. In addition, the respective limits on length of service indicated in Amendment 73 appear consistent with the mean and median lengths of service in the current Congress as calculated by the Congressional Accountability Project. However, the Arkansas law is not intended to apply nationally, and in 1998, the "broad category of persons" it will affect will probably be no more than five people.

But even accepting that this category of politician will be excluded from the printed ballot by Amendment 73, it remains that such persons still have the opportunity to win re-election to Congress by running as a write-in can-

didate consistent with Arkansas law. The Arkansas Supreme Court made a passing reference to the availability of the write-in:

"This effort to dress eligibility to stand for Congress in ballot access clothing, that is, as a regulatory measure falling within the State's ambit under Article 1, § 4, is not without some rational appeal. We do not agree, however, that excluding a broad category of persons from seeking election to Congress is a mere exercise of regulatory power. The intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service. We do recognize that an ineligible congressman under Amendment 73 is not totally disqualified and might run as a write-in candidate for Congress or receive a gubernatorial appointment to fill a vacancy in the same body. Following this thread, the appellants posit that term limitations do not mean disqualification—only ineligibility to be placed on the ballot as a candidate for certain offices. These glimmers of opportunity for those disqualified, though, are faint indeed—so faint in our judgment that they cannot salvage Amendment 73 from constitutional attack. See *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994)." *U.S. Term Limits v. Hill*, 316 Ark. 251, 266.

USJF asserts that the Court's dismissal of the legal and factual implications of the availability of the write-in option in citing to *Thorsted v. Gregorie*, is in error.

The District Court in *Thorsted* did consider the availability of a write-in option in connection with its review of a somewhat similar Washington state term limits law, Initiative 573. (Wash. Rev. Code § 29.68). *Thorsted v. Gregoire*, 841 F.Supp. at 1078. The *Thorsted* court characterized the write-in option in that case as a "pinhole of opportunity." *Id.* Despite the similarities between the Arkansas and Washington state term limit proposals, a significant difference between the two states is the fact

that under Washington state law "Initiative 573 makes incumbents with the specified length of service 'ineligible to appear on the ballot or file a declaration of candidacy.'" (*Emphasis added*). *Thorsted v. Gregorie*, 841 F. Supp. at 1079. The *Thorsted* Court concluded that ineligibility to file a declaration of candidacy would disqualify write-in votes for candidates also barred from the printed ballot, because of a statute in Washington which requires that "One who seeks to be write-in candidate may file a declaration of candidacy not later than the day before the election." *Id.* (Wash. Rev. Code § 29.04.180). The Court stated that "*The measure will thus keep barred incumbents off the ballot no matter what they do.*" *Thorsted v. Gregoire*, 841 F. Supp. at 1079. (*Emphasis added*).

Almost in disregard of its own conclusion of law, the *Thorsted* court then went on to discuss its dissatisfaction with the write-in option, as if it were available, and concluded that the option alone was unconstitutional because the District Court thought it was harder to win election to Congress by write-in:

"Denial of ballot access ordinarily means unelectability. The State concedes that no one in its history has been elected to Congress by a write-in vote. The record shows that in the country as a whole only three candidates for the House have been elected by write-in votes since 1958, and only one candidate for the Senate has been elected by that method since 1954. The Initiative would thus have the practical effect of imposing a new qualification: non-incumbency beyond the specified periods. The intended and probable result would be the same as if the State were to adopt non-incumbency as an absolute requirement." *Thorsted v. Gregoire*, 841 F. Supp. at 1081.

The Arkansas Supreme Court made a startling mistake in citing to *Thorsted*, because, unlike the facts in *Thorsted*, no restriction on the eligibility for the write-in ballot is present in Amendment 73 or otherwise plead regarding

the law of the State of Arkansas. "Barred incumbents" or former office holders who have met the required service can use the write-in option as a method to obtain re-election in Arkansas, and the Arkansas Supreme Court failed to give proper consideration to this important distinguishing factor.

Further, the *Thorsted* court's gloomy dicta in consideration of the hypothetical possibilities of election to Congress by write-in, coupled with the Arkansas Supreme Court's reference to the faint "glimmers of opportunity" presented to candidates by this option, confuses law with politics. Congressman Ron Packard is an example of a current Member of Congress who did win a write-in election:

"No matter how long Packard serves in Congress, nothing in his electoral career is likely to match the tumult of the contest that brought him to Congress and made him one of the few members ever elected as a write-in candidate.

When GOP Rep. Clair W. Burgener announced his retirement in 1982, Packard and 17 other Republicans filed for the primary. Packard, a veteran of Carlsbad city politics, emerged as a front-runner. But he found himself in a pitched battle with recreational vehicle tycoon Johnnie Crean.

A political neophyte, Crean sank close to \$1 million into his bid, which consisted largely of personal attacks on his rivals, some wildly inaccurate. Afterward, Crean blamed his campaign's conduct on his consultants, whom he fired the day after the primary. Crean earned the abiding scorn of many Republicans but won the nomination over Packard by 92 votes.

Many GOP partisans were unhappy with the outcome, and they helped persuade Packard to enter the general election as a write-in candidate. Crean tried to mend fences and reform his image. He argued that Republicans choosing Packard would split

the GOP vote, electing the Democratic nominee, Roy Pat Archer, a professor of government. Party officials came out for Crean, and Packard's funding dried up.

But Packard was still strong at the grass-roots level. While press coverage kept the Crean controversy fresh, Packard sent out 350,000 pieces of mail proclaiming himself the legitimate GOP alternative. On Election Day, his poll workers handed out pencils with Packard's name, urging their use. Packard edged Archer by 8,000 votes. Crean ran third.

Packard has not been seriously challenged since and most recently won re-election by a 2-1 ratio." *Congressional Quarterly's Members, 103rd Congress, House of Representatives.*

The reality is that, although it hasn't happened often in the history of Congressional elections, candidates have indeed been elected to Congress by the write-in ballot. In the case of Ron Packard, 66,441 write-in voters, to be exact, gave him 37% of the total vote (*id.*) and a commanding victory over the official nominees of the Republican and Democratic party, whose names were printed on the ballot. The District Court in *Thorsted* failed to recognize that electability or "unelectability" is more a function of *political* factors than it is a question of legal analysis. "Electability" or "unelectability" is a *political* matter that should not be the determining factor in the review of Amendment 73's constitutionality, where ballot access for a long-term incumbent or former office-holders is otherwise available through a write-in candidacy.

Long-term incumbent politicians have natural advantages over challengers that are made manifestly clear in the preamble to Amendment 73. Such natural advantages of incumbency include high name identification, prestige of office, and usually an advantage in fundraising to finance an effective campaign. The expressions of

opinion articulated by the Arkansas Supreme Court and *Thorsted* Court about the perceived difficulties of "barred incumbents" candidates to mount formidable re-election campaigns as write-ins should be recognized as utter speculation on the part of those Courts.

Finally, in deciding *Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274 (1974), the Supreme Court concluded that a law which barred certain candidates for the House of Representatives from the ballot in California was not unconstitutional. In a footnote, this Court stated, "Moreover, we note that the independent candidate who cannot qualify for the ballot may nevertheless resort to the write-in alternative provided by California law, see §§ 18600-18603 (Supp.1974)." *Storer v. Brown*, 415 U.S. at 736.

The write-in option available in Arkansas consistent with Amendment 73 is more than a meaningless or faint option. A Member of the House of Representatives who has served six years, or a member of the Senate who has served twelve years, and now wishes to seek re-election, has a real opportunity to do so, even though such candidates would be barred from the printed ballot under Amendment 73.

B. Amendment 73 Is Consistent With Decisions Upholding State Regulation of the Time, Place and Manner of Congressional Elections.

While recognizing a candidate does not have a fundamental right to candidacy requiring close scrutiny (*U.S. Term Limits v. Hill*, 316 Ark. 251, 271, citing to *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 3 L.Ed.2d 92 (1972); and *Clements v. Fashing*, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982) (plurality decision)), and that states have more than mere regulatory powers in determining a similar term limit provision covering state legislative and executive offices was constitutionally permissible (*U.S. Term Limits v. Hill*, 316 Ark. at 271), the Arkansas Supreme Court nevertheless invalidated the pro-

visions of Amendment 73. In this regard, the Arkansas Supreme Court failed to recognize the ballot access available to "barred incumbents," and failed to apply the same standard that it employed in reviewing the constitutionality of the term limits provisions for state elected officials.

The Arkansas Supreme Court also failed to recognize the *Storer* Court's observation that "States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, *with respect to both federal and state elections*, the time, place, and manner of holding primary and general elections, the registration and qualification of voters, *and the selection and qualification of candidates*." *Storer v. Brown*, 415 U.S. at 730. (*Emphasis added*).

Had the Arkansas Supreme Court recognized that "barred incumbents" for Federal office have an avenue to election, it should have found Amendment 73 as an otherwise permissible regulation of the manner of elections under Article 1 § 4 of the United States Constitution. In this context, the appropriate analysis should have been whether the state had a rational basis to justify the ballot restriction.

II. THE APPROPRIATE STANDARD OF REVIEW IS THE RATIONAL BASIS TEST.

The test of the constitutionality of an otherwise permissible state election regulation, as articulated in *Storer*, is a consideration of "the facts and circumstances behind the law, the interests which the state claims to be protecting, and the interests of those who are disadvantaged by the classification." *Storer v. Brown*, 415 U.S. at 730, citing to *Williams v. Rhodes*, 393 U.S. 23 at 30 (1968) and *Dunn v. Blumstein*, 405 U.S. 330 at 355 (1972).

In considering the policy behind Amendment 73, the Arkansas Supreme Court reviewed its preamble:

"The people of Arkansas find and declare that elected officials who remain in office too long become

preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of the elected officials." (*id.*, 256.)

The Court then considered the standard of review applicable to the state elected officials:

"However, not every burden on the right to vote is subject to strict scrutiny or requires a compelling state interest to justify it." (*id.*, 271.)

The California Supreme Court considered the effect of a constitutional amendment fixing term limits on elected state officials. *Legislature of the State of California v. Eu*, 54 Cal.3d 492, 286 Cal.Rptr. 283, 816 P.2d 1309 (1991), *cert. denied*, — U.S. —, 112 S.Ct. 1292, 117 L.Ed.2d 516 (1992). The stated policy behind the California amendment, which like Amendment 73 was also adopted by the voters as a ballot proposition, is as follows:

"The people find and declare that the Founding Fathers established a system of representative government based upon free, fair, and competitive elections: The increased concentration of political power in the hands of incumbent representatives has made our electoral system less free, less competitive, and less representative. The ability of legislators to serve unlimited number of terms, to establish their own retirement system, and to pay for staff and support services at state expense contribute heavily to the extremely high number of incumbents who are re-elected. These unfair incumbent advantages discourage qualified candidates from seeking public office and create a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers. These career politicians become repre-

sentatives of the bureaucracy, rather than of the people whom they are elected to represent. To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office, the people find and declare that the powers of incumbency must be limited." (Article IV, § 1.5, California Constitution.)

The California Supreme Court considered the interests of the voters and supporters of certain candidates against the will of the electorate limiting incumbent terms and held that the amendment would prevail irrespective of whether a rational basis standard or a compelling state interest standard was employed. The *Eu* Court stated: "In sum, it would be anomalous to hold that a statewide initiative measure aimed at 'restor[ing] a free and democratic system of fair elections,' and 'encourag[ing] qualified candidates to seek public office' (Cal. Const., art. IV, § 1.5), 'is invalid as an unwarranted infringement of the rights to vote and to seek public office.'" *Legislature of the State of California v. Eu*, 816 P.2d at 1829.

Ample evidence was presented in the current case to allow the court to draw a conclusion that long-term incumbency by Federal elected officials is a detriment, rather than an enhancement, to government. The preamble to Amendment 73 adequately expresses a state policy upon which this Court may conclude that the restriction as applied to the small class of "barred incumbents" has a rational basis, and is therefore not unconstitutional. In failing to weigh the interests of the state against the interests of incumbent politicians, and in failing to consider the interests of Arkansas voters in Federal elections similarly to the interests of those same voters in state elections, the Arkansas Supreme Court erred.

In 1992 voters in California adopted Proposition 164, the California congressional term limits law. Ca. Elec. § 25003. The California law permits write-in candidacies of otherwise "barred incumbents." Ca. Elec. § 25003.(b).

The policy behind the California law is in many respects similar to that found in Amendment 73:

"(a) Federal officeholders who remain in office for extended periods of time become preoccupied with their own reelection and for that reason devote more effort to campaigning for their office than making legislative decisions for the benefit of the People of California.

(b) Federal officeholders have become too closely aligned with the special interest groups who provide contributions and support their reelection campaigns, give them special favors, and lobby the House of Representatives and Senate for special interest legislation, all of which can create corruption or the appearance of corruption of the legislative system.

(c) Entrenched incumbency has discouraged qualified citizens from seeking office and has led to a lack of competitiveness and a decline in robust debate on issues of importance to the People of California.

(d) Due to the appearance of corruption and the lack of competition for the legislative seats held by entrenched incumbents, there has been a reduction in voter participation which is counter-productive in a representative democracy.

(e) The citizens of this state have a compelling interest in preventing corruption and the appearance of corruption by LIMITING [sic] the number of TERMS [sic] which any Senator or Representative representing the People of this state may serve.

(f) The citizens of this state have a compelling interest in preserving the integrity of the ballot by promoting competitive elections and LIMITING [sic] the influence of special interests upon entrenched incumbent legislators.

(g) The citizens of this state have a compelling interest in voting for the candidate and candidates

of their choice, and in standing for and holding elective office, and in preventing the perpetual monopolization of elective offices by incumbents.

(h) The citizens of this state have a compelling interest in extending the equal protection of the laws by ensuring that more of the People of this state have an equal opportunity to stand for and hold elective office." § 2, Findings and Declarations, (a) through (h), Proposition 164, 1992.

Voters in California, Arkansas, and many other states have provided strong support to the idea that long-term incumbency is detrimental to the democratic system. USJF urges this honorable Court to consider the point raised by Petitioners, that the "term limits movement . . . is the most significant grassroots political phenomenon of recent years."¹

However, restrictions on incumbency are nothing new in the history of Republican government. The ancient Roman Republic was presided over for almost five hundred years by a pair of annually elected officials who were known as consuls,² and who by law could not stand for re-election until a fixed time had passed.³ Term limits have been required of Federal executive branch officials for many years, and a growing number of states are adopting term limit provisions not only for their executive branch officials, but also for their state legislators. It is now time for the U.S. Supreme Court to respect the wishes of the citizens of Arkansas and limit the terms of its Members of Congress by upholding the constitutionality of Amendment 73.

¹ See Petitioner U.S. Term Limits "Petition for a Writ of Certiorari," No. 93-1456, Supreme Court of the United States, October Term, 1993, p. 8.

² See generally, *The Founders of the Western World*, by Michael Grant, Scribners, 1991, p. 148.

³ *Fall of the Roman Republic*, [Life of Gaius Marius, paragraph 12], Plutarch, Penguin Classics, 1972, p. 24.

CONCLUSION

For the foregoing reasons, this Court should grant petitioner's claim and find that Amendment 73 is not unconstitutional.

Respectfully submitted,

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20 17
No. 93-1456 & 93-1828

Supreme Court, U.S.

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STATE OF ARKANSAS *ex rel.* WINSTON BRYANT, Attorney
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BRIEF AMICI CURIAE OF MOUNTAIN STATES LEGAL
FOUNDATION, THE WYOMING CITIZENS FOR
RESPONSIBLE GOVERNMENT, THE SOUTH DAKOTANS
FOR TERM LIMITS, THE MONTANANS FOR LIMITED
TERMS, NEW MEXICANS FOR TERM LIMITS, ARIZONA
CITIZENS FOR LIMITED TERMS, and AMERICANS BACK
IN CHARGE IN SUPPORT OF U.S. TERM LIMITS, INC.

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TABLE OF CONTENTS

	Page
IDENTITIES AND INTERESTS OF AMICI.....	2
SUMMARY OF ARGUMENT.....	3
ARGUMENT	5
I. The people of Arkansas have the authority under Article I § 2 and the Seventeenth Amendment to limit the terms of federal repre- sentatives and senators.....	5
II. The qualifications contained in Article I do not bar the people of Arkansas from limiting the terms of their federal representatives and sen- ators.....	9
A. The qualifications contained in Article I preempt additional qualifications only to the extent that such additional qualifica- tions are imposed without the consent of the electorate	10
1. The principle of popular sovereignty in remarks of the framers and ratifiers of the U.S. Constitution concerning qualifications for Congress.....	11
2. The principle of popular sovereignty in <i>Powell v. McCormack</i>	13
3. The principle of popular sovereignty in the debates concerning the seating of William McCreery	14
B. Because Amendment 73 was enacted by a popular vote of the Arkansas electorate, it is not preempted by the qualifications con- tained in Article I.....	17

TABLE OF CONTENTS - Continued

	Page
III. Amendment 73 does not violate any requirement that qualifications for federal legislative office be "defined and fixed".....	18
IV. Amendment 73 does not reduce the choices available to future electorates in Arkansas, because, by eliminating government-conferred advantages of incumbency, Amendment 73 increases the availability of viable challengers who would otherwise be excluded.....	20
A. Government-conferred benefits of incumbency prevent future electorates from electing non-incumbent candidates	22
B. The U.S. Constitution permits the people of Arkansas to limit candidacy of incumbents in order to prevent government-conferred political advantage from reducing competition in elections.....	28
CONCLUSION	30

TABLE OF AUTHORITIES

	Page
I. CASES:	
<i>Austin v. Michigan Chamber of Commerce</i> , 494 U.S. 652 (1990)	28
<i>Lucas v. Colorado General Assembly</i> , 377 U.S. 713 (1964)	17
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969) ..	9, 11, 12, 13
<i>United States Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers</i> , 413 U.S. 548 (1973)	29, 30
<i>U.S. Term Limits, Inc. v. Hill</i> , 316 Ark. 251, 872 S.W.2d 349 (1993).....	9, 14, 18
II. CONSTITUTIONAL PROVISIONS:	
U.S. Const., Art. I, § 2.....	<i>passim</i>
U.S. Const., Art. I, § 4.....	3, 4, 10, 11, 18
U.S. Const., Art. I, § 5.....	13
U.S. Const., amend. XVII	<i>passim</i>
Arkansas Const., Amendment 73 (popular name)	<i>passim</i>
III. BOOKS AND ARTICLES:	
Herbert Alexander, <i>Financing Politics: Money, Elections, and Political Reform</i> (1976)	24
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James M. Beck, <i>The Vanishing Rights of the States</i> (1926)	13

TABLE OF AUTHORITIES – Continued

Page

Richard S. Beth, <i>Incumbency Advantage and Incumbency Resources: Recent Articles</i> , 9 Cong. & Presidency 119 (1984)	22
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Troy Eid & Jim Kolbe, <i>The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office</i> , 69 Den. U.L. Rev. 1 (1992)	10
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TABLE OF AUTHORITIES – Continued

Page

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Allan P. Grimes, <i>Democracy and the Amendments to the Constitution</i> (1978).....	8
George H. Haynes, <i>The Senate of the United States: Its History and Practice</i> (1938).....	8
Roderick M. Hills, Jr., <i>A Defense of State Constitutional Limits on Federal Congressional Terms</i> , 53 U. Pitt. L. Rev. 97 (1991).....	passim
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TABLE OF AUTHORITIES - Continued

	Page
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TABLE OF AUTHORITIES - Continued

	Page
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No. 93-1456 & 93-1828

—◆—
In The

Supreme Court of the United States

October Term, 1994
—◆—

U.S. TERM LIMITS, et al.,

v.

Petitioners,

RAY THORNTON, et al.,

Respondents.

—◆—
STATE OF ARKANSAS *ex rel.* WINSTON BRYANT, Attorney
General of the State of Arkansas,

v.

Petitioner,

BOBBIE E. HILL, et al.,

Respondents.

—◆—
On Writ Of Certiorari To The
Supreme Court Of Arkansas
—◆—

BRIEF AMICI CURIAE OF MOUNTAIN STATES LEGAL
FOUNDATION, THE WYOMING CITIZENS FOR
RESPONSIBLE GOVERNMENT, THE SOUTH DAKOTANS
FOR TERM LIMITS, THE MONTANANS FOR LIMITED
TERMS, NEW MEXICANS FOR TERM LIMITS, ARIZONA
CITIZENS FOR LIMITED TERMS, and AMERICANS BACK
IN CHARGE IN SUPPORT OF U.S. TERM LIMITS, INC.
—◆—

Mountain States Legal Foundation, the Wyoming Cit-
izens For Responsible Government, the South Dakotans
For Term Limits, the Montanans For Term Limits, New
Mexicans For Term Limits, Arizona Citizens For Limited
Terms, and Americans Back In Charge in Colorado, by

and through their counsel, respectfully submit this brief *amici curiae*, pursuant to Supreme Court Rule 37, in support of petitioner U.S. Term Limits, Inc.¹.

IDENTITIES AND INTERESTS OF AMICI

Mountain States Legal Foundation ("MSLF") is a non-profit, membership public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, a limited and accountable government and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every state in the Union. A large number of MSLF's members live in western states in which citizens have actively worked for term limits, including Colorado, which was the first state to pass a constitutional amendment limiting terms in 1990.

The Wyoming Citizens For Responsible Government, the South Dakotans For Term Limits, the Montanans For Term Limits, New Mexicans For Term Limits, Arizona Citizens For Limited Terms, and Americans Back In Charge in Colorado are independent grassroots organizations dedicated to passing and preserving term limits initiatives in their respective states.

Amici's interests in the outcome of this lawsuit are directly tied to their members' interests in ensuring truly representative government. *Amici* believe that the ruling of the Arkansas Supreme Court does violence to the most basic principle underlying our constitutional system, popular sovereignty.

¹ *Amici* have obtained the written consents of the parties. The written consents have been provided to the Clerk of the Court.

SUMMARY OF ARGUMENT

The people of Arkansas are authorized to enact Amendment 73, the challenged term limit, pursuant to Article I, § 2 and the Seventeenth Amendment of the U.S. Constitution. Because Amendment 73, Arkansas' term limit, was enacted through a plebiscite by a majority vote of the people of Arkansas, it constitutes a decision by the people pursuant to Article I, § 2 and the Seventeenth Amendment as to who shall represent the Arkansas electorate in Congress.

Regardless of whether Amendment 73 constitutes a regulation of the "manner" of elections under Article I, § 4, it is itself an election in which the electorate determined that certain sorts of incumbent federal legislators should no longer serve in Congress. This decision is expressly delegated to the electorate of Arkansas by Article I, § 2, clause 1, and the Seventeenth Amendment.

The qualifications contained in Article I do not bar the people of Arkansas from exercising their delegated power to choose who will represent them in Congress. The Arkansas Supreme Court cited various authorities for the proposition that the qualifications contained in Article I are exclusive of all others.

At most, however, these authorities suggest that government officials – state or federal legislatures – lack power to restrict the range of candidates available for consideration by the electorate.² This principle of popular

² Of course, none of these authorities cast any doubt on the power of both the state legislatures and Congress to regulate the "time, place, and manner" of elections pursuant to Article I, § 4. To the extent that this Court finds that Amendment 73 is such a regulation of the "manner" of regulations, this Court can reverse the decision of the Arkansas Supreme Court without addressing the arguments presented by *amici*. However, if this

sovereignty does not invalidate Amendment 73, because Amendment 73 was directly enacted by a popular vote of the people of Arkansas. Amendment 73 does not interfere with the electorate's powers to choose senators and representatives: it constitutes the exercise of those powers.

Candidate qualifications also need not be uniform throughout the nation in order for them to be "fixed" as desired by the framers. The framers treated voter and candidate qualifications similarly: both were sufficiently "defined and fixed" if they were defined in state constitutions and unalterable by Congress and the state legislatures.

Finally, Arkansas' limit on federal legislative terms does not unconstitutionally interfere with the power of the electorate freely to choose Federal legislators. First, while it is true that the term limit impedes the ability of long-term incumbents to be re-elected, the term limit facilitates the ability of challengers to be elected. Given that Congress bestows significant advantages on long-term incumbent legislators, Arkansas' term limit may actually increase the choices available to the electorate, by preventing the government-conferred advantages of incumbency from practically excluding viable challenges to long-term incumbents.

Second, the term limit enacted by Arkansas voters in 1992 can be repealed by a simple majority of Arkansas voters. If future electorates in Arkansas wish to elect incumbents excluded by Arkansas' term limit, they need only repeal that term limit in the same way that it was enacted - by a popular vote in a plebiscite. Thus, no

Court accepts *amici's* argument that Amendment 73 is authorized by Article I, § 2 and the Seventeenth Amendment, then the Court need not reach the issue of whether Amendment 73 is a valid regulation of the "manner" of elections pursuant to Article I, § 4.

present majority of voters has "alienated" the power to elect legislators by making some irreversible decision to exclude long-term incumbents. Rather, the Arkansas electorate simply reversed the congressionally created presumption that incumbents should generally prevail over challengers.

ARGUMENT

I. The people of Arkansas have authority under Article I, § 2 and the Seventeenth Amendment to limit the terms of federal representatives and senators.

Article I, § 2 of the U.S. Constitution provides that U.S. representatives shall "be chosen . . . by the People of the several States." The Seventeenth Amendment likewise provides that senators "from each State" shall be "elected by the people thereof." Therefore, the national people, through the U.S. Constitution, have delegated the power of choosing federal legislators to the people of the several states, including the people of Arkansas.

The issue is whether Amendment 73, Arkansas' term limit for federal legislators, constitutes a permissible exercise of this power to elect senators and representatives. The *amici* submit that the popular approval of Amendment 73 constituted a choice of federal legislators authorized by Article I, § 2 and the Seventeenth Amendment. In determining whether Arkansas' term limit is authorized by Article I, § 2 and the Seventeenth Amendment, it is crucial to note that Amendment 73 was approved by a majority of Arkansas voters in a plebiscite amending the state constitution. This plebiscite constituted a popular election in which the voters determined whether they wished to be represented by incumbents who have served three terms in the House of Representatives or two terms in the Senate.

By enacting Amendment 73, the people of Arkansas essentially voted against such incumbents and voted in favor of candidates who had not served for the specified period in the Congress. The enactment of Amendment 73, in other words, is analogous to a party primary, a preliminary vote in which voters determine which candidates should be eligible for further consideration on the ballot in the general election.³

Nothing in Article I, § 2 or the Seventeenth Amendment excludes this method of rejecting candidates for federal legislative office. Of course, the popular enactment of Amendment 73 differs from the normal election of federal legislators, because Arkansas voters did not vote on specified individual candidates listed separately on a ballot. Rather, by enacting Amendment 73, Arkansas voters voted against an entire *class* of candidates – incumbent senators who had served for two terms and incumbent representatives who had served for three terms.

But Article I, § 2 and the Seventeenth Amendment nowhere require that voters choose Senators and representatives by voting for individual candidates listed on a ballot. Article I, § 2 and the Seventeenth Amendment state only that representatives and senators shall be “chosen” or “elected” by the people of the several states. There is no constitutional requirement that the electorate vote on individual candidates as opposed to general classes of candidates. Moreover, there can be no dispute that election systems, such as “list” systems, in which the electorate votes for general classes of candidates rather

³ See Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. 97, 107-110 (1991).

than individual candidates, can be fair and democratic methods of registering public opinion.⁴

The popular ratification of Amendment 73 is analogous to an election under such a “list” system of electing legislators: the Arkansas electorate voted against one general class of candidate (the specified sort of incumbent federal legislator) in favor of another class of candidate (the class of candidates who lack the specified type of incumbency). Such a decision by the people of Arkansas to reject one class of candidates in favor of another is an election authorized by the plain language of Article I, § 2 and the Seventeenth Amendment.

To understand how the power to choose senators and representatives implies the power to impose additional qualifications for senators and representatives, it is instructive to review the method by which many state legislatures selected senators prior to the ratification of the Seventeenth Amendment. In 1901, Oregon adopted a system under which state legislators would pledge to cast their vote only for those candidates for the U.S. Senate who had won a majority of the popular vote in a statewide election. By law, the state legislature would be presented with the names of the two persons who had

⁴ List systems generally provide the voters with lists or “slates” of candidates belonging to different political parties. The lists are compiled by the political parties. In some list systems, the voters do not vote on individual candidates but rather vote for or against the entire party slate. The parties receive the same proportion of seats in the legislature as they received votes in the election. See generally Enid Lakeman, *How Democracies Vote: A Study in Majority and Proportional Electoral Systems* 98, 168-214 (1955). At least one commentator has noted that limits on legislative terms can serve purposes analogous to such “list” systems of election. See Andrew R. Dick & John R. Lott, Jr., *Reconciling Voters’ Behavior with Legislative Term Limits*, 50 J. of Pub. Econ. 1, 12 (1993).

won this popular vote and thereby been nominated by the electorate. The state legislature, composed of persons who had pledged to vote for the popularly elected candidate, would then approve these two names and send them to the U.S. Senate.⁵

Several, mostly Western, states adopted the "Oregon system" of electing senators. As commentators have noted, this system of election effectively transformed the method of senatorial election from indirect election by the state legislatures into direct election by the voters. In purpose and effect, the state legislatures that had adopted the Oregon system added a qualification for election to the U.S. Senate: they disqualified all candidates that had not won a majority of votes cast in a state-wide popular election.⁶ Although popular election was nowhere mentioned as a qualification for U.S. Senators until the ratification of the Seventeenth Amendment in 1913, the state legislatures had the power to impose this additional qualification for office pursuant to Article I, § 3, which delegated plenary power to choose U.S. senators to the state legislatures.

Like the state legislatures prior to the ratification of the Seventeenth Amendment, the people of the several states have plenary power to select members of Congress. There is no limit on their power to disqualify candidates by popular vote: indeed, it is the duty of the people of the several states to determine whether candidates are qualified to serve in Congress. Just as the State legislatures

⁵ See George H. Haynes, *The Senate of the United States: Its History and Practice* 101-102 (1938) (describing "Oregon system" of electing senators); Allan P. Grimes, *Democracy and the Amendments to the Constitution* 76 (1978).

⁶ See Haynes, *The Senate of the United States* at 104.

could add qualifications for U.S. Senators by disqualifying all candidates who had not won a popular election, so too, the people of the several states can disqualify classes of incumbents. In either case, the entity to which the U.S. Constitution delegates power to select members of Congress (the state legislatures or the people of the several states) are simply exercising their delegated power to select congresspersons.⁷

II. The qualifications contained in Article I do not bar the people of Arkansas from limiting the terms of their federal representatives and senators.

The Arkansas Supreme Court held that Amendment 73 "is violative of the respective Qualification clauses of Article I of the U.S. Constitution." *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 263, 872 S.W.2d 349, 355 (1993). According to the court, the three qualifications enumerated in Article I, § 2 of the U.S. Constitution – age, citizenship, and residency – were intended to exclude all others in order to insure "uniformity in qualifications." *U.S. Term Limits, Inc.*, 316 Ark. at 265, 872 S.W.2d at 356. In reaching this holding, the court relied heavily on this Court's decision in *Powell v. McCormack*, 395 U.S. 486 (1969) and on two historical sources cited in *Powell* – a passage from Hamilton's *Federalist No. 60* and the 1807 debates in the Tenth Congress over whether Representative-elect William McCreery should be permitted to take his seat in the House of Representatives.

The Arkansas Supreme Court mistakenly held that the history of Article I and the case law construing it stands for a fundamental principle of "uniformity" for "representation of the various states in Congress."

⁷ See Hills, *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. at 108-109.

Assuming *arguendo* that the qualifications contained in Article I preempt additional qualifications, such preemption occurs only to the extent that the additional qualifications are imposed on the electorate *without the electorates' consent*.

As explained in more detail below, this principle of popular sovereignty is not violated by Amendment 73, because Amendment 73 was enacted by a popular vote of the electorate. Amendment 73 does not restrict the voters' choice of candidates without their consent. Rather, Amendment 73 itself *is* the electorate's choice of candidates: in the words of the *Powell* Court, Amendment 73 is itself the exercise of the right of the people of Arkansas to " 'choose whom they please to govern them.' " *Powell*, 395 U.S. at 547. Therefore, the Arkansas Supreme Court erred in finding that Amendment 73 was preempted by the qualifications already contained in Article I.

A. The qualifications contained in Article I preempt additional qualifications only to the extent that such additional qualifications are imposed without the consent of the electorate.

According to some commentators, the qualifications contained in Article I preempt all other qualifications for congresspersons.⁸ Of course, to the extent that "qualifications" for congressional office are simply regulations of the "manner" of elections, they are not preempted by Article I but rather are explicitly authorized by Article I, § 4.⁹

⁸ See, e.g., Troy Eid & Jim Kolbe, *The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office*, 69 Den. U.L. Rev. 1 (1992).

⁹ In the interests of preserving space, *amici* rely entirely on the briefs of petitioner U.S. Term Limits, Inc. to explain how

However, even assuming *arguendo* that Amendment 73 does not constitute a regulation of the "manner" of elections under Article I, § 4, it does not follow that it is preempted by the qualifications already contained in Article I. As explained by some of the drafters and ratifiers of the Constitution, some of the members of the Tenth Congress, and this Court in *Powell v. McCormack*, 395 U.S. 486 (1969), Article I preempts additional qualifications only in order to protect the electorate from unauthorized restrictions on the electorate's power under Article I to choose members of Congress. Where the electorate itself disqualifies candidates for Congress, this principle of popular sovereignty is not violated, because the disqualification is itself the exercise of the electorate's discretion that Article I protects.

1. The principle of popular sovereignty in remarks of the framers and ratifiers of the U.S. Constitution concerning qualifications for Congress.

As this Court noted in *Powell v. McCormack*, some delegates to the Philadelphia Convention and to the state ratifying conventions argued against imposing qualifications for Congress additional to those few qualifications contained in Article I. *Powell*, 395 U.S. at 540-42. All of these historical arguments against additional qualifications, however, were based on the theory of popular sovereignty – the principle that the discretion of the electorate to choose its congressional delegation should be as unrestricted as possible. As Hamilton stated,

the true principle of a republic is, that the people should choose whom they please to govern

Amendment 73 is a permissible regulation of the "manner" of federal elections pursuant to Article I, § 4.

them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed.

Powell, 395 U.S. at 541 (quoting Hamilton's remarks in the New York ratifying convention).¹⁰

As the *Powell* Court also noted, the framers were greatly influenced by the controversy over Parliament's exclusion of John Wilkes, a controversy in which the House of Commons barred Wilkes from taking his seat three times, despite his overwhelming popularity with his constituency. *Powell*, 395 U.S. at 527-530. To prevent Congress from similarly disregarding the wishes of the local electorate, the framers installed "standing qualifications" limiting Congress' discretion to bar elected candidates from taking their seats.

Again, the limitation on Congress' ability to disqualify candidates for federal legislative office is not rooted in a desire for uniformity of qualifications but rather in the principle that the electorate should have broad discretion to choose its own representatives: the framers "did not think that the elected had any right in any case to narrow the privileges of the electors."¹¹

¹⁰ See also 2 The Records of the Federal Convention of 1787 250 (Max Farrand ed., rev. ed. 1966) (remarks of James Madison); *Powell*, 395 U.S. at 541 & n.76 (quoting speeches by Robert Livingstone and Wilson Carey Nicholas); 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 298 (Jonathan Elliot ed., reprint 1987) (1896) (speech of Richard Harrison in Virginia ratifying convention denouncing mandatory rotation because it would exclude from Congress persons "in whom the confidence of the legislature and the love of the people are united").

¹¹ 2 Records of the Federal Convention of 1787, at 205 (remarks of Benjamin Franklin).

2. The principle of popular sovereignty in *Powell v. McCormack*

This fear that Congress might deprive the state electorates of their power to choose their own representatives has persisted throughout the history of the United States.¹² The House of Representative's attempt to exclude Adam Clayton Powell indicates the most recent instance in which Congress has improperly tried to restrict the powers of the electorate to choose their own representatives. In *Powell*, this Court held that the House of Representatives could not exclude Adam Clayton Powell from the House by a simple majority vote pursuant to its powers under Article I, § 5 to judge the qualifications of its members. In dicta, the Court noted that the exclusion of Powell violated "[a] fundamental principle of our representative democracy" that "'the people should choose whom they please to govern them.'" *Powell*, 395 U.S. at 547 (quoting Hamilton).

To the extent that *Powell*'s dicta went beyond the narrow holding concerning the powers of the House of Representatives under Article I, § 5, this dicta relied on a principle of popular sovereignty, not a principle that qualifications had to be uniform across the nation. The *Powell* Court simply asserted that the electorate had been delegated the power to choose representatives by Article I and that Congress could not limit this power by excluding candidates elected by the majority of the electorate.

¹² See, e.g., James M. Beck, *The Vanishing Rights of the States* 52 (1926) (decrying Senate Committee's investigation into Senator-elect Vare's right to take his seat as invasion of local prerogative of election).

3. The principle of popular sovereignty in the debates concerning the seating of William McCreery

The Arkansas Supreme Court relied on the Tenth Congress' 1807 decision to seat William McCreery and ignore Maryland's statute requiring U.S. representatives from Baltimore County to reside in the City of Baltimore. According to the court, these debates indicate that qualifications must be uniform throughout the nation. *U.S. Term Limits, Inc.*, 316 Ark. at 265, 872 S.W.2d at 356.

However, the Arkansas Supreme Court misread the import of the McCreery case in two ways. First, it is not the case that the Committee Report issued any opinion concerning the constitutionality of Maryland's additional residency requirement. In fact, the report deliberately refrained from expressing any such opinion.¹³

Second, assuming *arguendo* that the remarks of individual congresspersons can be construed to stand for any broad proposition concerning the constitutionality of additional qualifications, the principle adopted by these individual congresspersons was not uniformity of qualifications but protection of popular sovereignty. Maryland's additional residency requirement had been approved only by the Maryland legislature and not by the people of Maryland: the residency requirement was contained in an ordinary statute, not in an amendment to the state constitution.

This fact did not go unnoticed by those who spoke in support of McCreery. For instance, Representative Johnson explicitly stated that the Maryland legislature could not add qualifications but that the people of Maryland could add such qualifications:

¹³ See Hills, *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. at 124.

The question was whether any State Legislature, or any other power of legislation, could add qualifications to any member of that House. He laid it down as a principle that every contraction of qualifications for Representatives was an abridgment of the liberty of the citizen. The power of adding other qualifications than those fixed by the constitution, would, in his opinion, be a breach of the right of suffrage. . . . he was not satisfied that any Legislature of the Union had a discretion under the constitution to legislate on these important principles; *he thought that discretion rested only with a convention of the people . . . Would any power less than a convention of the State of Maryland assume the right of adding a disqualification?*

Digest of Contested Election Cases 171 (M. St. Clair & David A. Hall eds., 1834) (Case XXVI: *Barney v. McCreery*) (emphasis added).

The principle that emerges from Johnson's speech, as well as the speeches of other representatives, is that the Maryland legislature could not add qualifications because disqualifying candidates was the exclusive prerogative of the people and could only be imposed by the "people in convention."¹⁴ As Johnson stated, "[t]here was a great distinction between the power of the people in convention, and the power of the legislature growing out of a constitution, which the people entered into in their sovereign capacity."¹⁵

¹⁴ Digest of Contested Election Cases, at 194.

¹⁵ *Id.* See also Hills, *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. at 123-28; Robert C. DeCarli, Note, *The Constitutionality of State-Enacted Term Limits Under the Qualifications Clauses*, 71 Tex. L. Rev. 865, 892-97 (1993).

Representative Johnson's distinction between state legislatures and the electorate reflects the familiar but fundamental distinction drawn by the framers between direct elections by the electorate – "the people" – and indirect elections by legislative bodies. The central debate in the Philadelphia convention concerned whether Congress should be chosen immediately by the people or mediated by the state legislatures.¹⁶ A central issue in this debate was whether election directly by the people would result in a more democratic and popularly responsive House of Representatives. In adopting direct elections, the framers signified their distrust of state legislatures and desire for a more popularly accountable method of election.¹⁷

Thus, Representative Johnson's remarks in the debates concerning the seating of McCreery reflect deep concerns of popular sovereignty incorporated into Article I. Like the framers, Representative Johnson and others wished to preserve direct elections by the people of the several states from any encroachment by the state legislatures. The debates surrounding the seating of William McCreery involved this fundamental principles of popular sovereignty more than it involved concerns about uniformity of qualifications.

In summary, one can assume *arguendo* that the U.S. Constitution limits the ability to disqualify candidates for

¹⁶ See generally Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 228-240 (1985).

¹⁷ James Wilson vigorously argued in favor of direct elections precisely because the state legislatures might be "actuated by . . . an official sentiment opposed to that of the Genl: Govt. and perhaps to that of the people themselves." 1 Records of the Federal Convention of 1787, at 359 (Max Farrand ed., rev. ed. 1966) (emphasis added).

federal office. However, it is crucially important to understand the purpose served by this limitation: the framers wished to give the people of the several states the widest possible discretion in electing their representatives, because "[t]o dictate and control them, to tell them whom they shall not elect is to abridge their natural rights."¹⁸ The issue in this case is whether this principle should result in the invalidation of Amendment 73.

B. Because Amendment 73 was enacted by a popular vote of the Arkansas electorate, it is not preempted by the qualifications contained in Article I.

Amendment 73 was enacted through a ballot initiative by a majority of the electorate in Arkansas. For this reason, the principle of popular sovereignty described above has no application to Amendment 73. Far from being an interference with the power of the people of the several states to choose representatives, Amendment 73 itself constitutes a choice by the Arkansas electorate concerning who should represent them.

In most instances, the fact that a challenged law is enacted by a popular majority through a plebiscitary process has no bearing on its constitutionality. *Lucas v. Colorado General Assembly*, 377 U.S. 713, 737 (1964). However, as explained above, the only reason that the qualifications contained in Article I preempt additional qualifications is that such additional qualifications interfere with the prerogative of the state electorates to choose whom they please to represent them. Article I and the

¹⁸ 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution at 320 (remarks of Robert Livingstone in New York ratifying convention).

Seventeenth Amendment delegate the duty of choosing members of Congress to the people of the several states. Therefore, unless a disqualification of candidates for Congress is a valid regulation of the manner of elections under Article I, § 4, neither the state legislatures nor Congress can disqualify candidates for federal legislative office.

This principle is inapplicable to Amendment 73, because the electorate of Arkansas has authority to choose representatives and senators. Therefore, it is not barred by Article I from adding qualifications that exclude candidates for these positions: unlike Congress or the state legislatures, such *popular* disqualification of candidates does not interfere with a power that is delegated to another entity by the U.S. Constitution. By eliminating a class of candidates from consideration, the electorate simply exercises its delegated powers under Article I and the Seventeenth Amendment.

III. Amendment 73 does not violate any requirement that qualifications for federal legislative office be "defined and fixed."

The Arkansas Supreme Court quoted Alexander Hamilton's statement in *Federalist No. 60* that qualifications must be "defined and fixed" to support the contention that qualifications for Congress must be uniform and cannot vary from state to state. *U.S. Term Limits, Inc.*, 316 Ark. at 264-65, 872 S.W.2d at 356. However, the court misconstrued the import of Hamilton's statement. Hamilton's statement actually indicates that qualifications for Congress were "fixed" in precisely the same way as qualifications for voters: in both cases, qualifications were fixed by the *state* constitutions as approved by the people of the several states.

To understand Hamilton's meaning, it is important to note that Hamilton was referring both to qualifications for elected officials *and* to qualifications for electors. According to Hamilton, "[t]he qualifications of the persons *who may choose or be chosen* . . . are defined and fixed in the Constitution and are unalterable by the legislature." Alexander Hamilton, *Federalist No. 60*, in *The Federalist Papers* 371 (Clinton Rossiter ed. 1961) (emphasis added).

The qualifications of "the persons who may choose" – the voters – are, of course, nowhere given any uniform definition by the U.S. Constitution. Rather, Article I, § 2 of the U.S. Constitution simply states that voters "shall have the Qualifications requisite for the most numerous branch of the State Legislatures." Therefore, by stating that qualifications for congresspersons are "defined and fixed" by the U.S. Constitution, Hamilton cannot mean that these qualifications are uniform throughout the United States: such an interpretation of the phrase "fixed and defined" would make nonsense of Hamilton's reference to the qualifications for voters contained in the same sentence.¹⁹

Rather, Hamilton is arguing that qualifications for both congresspersons and voters are sufficiently defined and fixed if they are established by any manner that is "unalterable by the legislature" – meaning Congress. Hamilton's argument is based not on uniformity but on

¹⁹ See Hills, *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. at 106 & n.33; Donald Lutz, *The Origins of American Constitutionalism* 162 (1988) ("[t]he Founders seem to be telling us that some things about elections were not crucial to the operation of the Constitution, such as the characteristics of voters *and of those who run for office*").

popular sovereignty: taken in context, Hamilton's argument is that Congress cannot change candidate or voter qualifications to advantage a wealthy or well-born minority. It hardly follows from this statement that the voters themselves could not change candidate qualifications through an amendment of their state constitutions.²⁰

Therefore, Hamilton's statement actually indicates that Amendment 73 properly defines and fixes qualifications for congresspersons. Amendment 73 was approved by a majority of the voters as an amendment to the constitution of the State of Arkansas. Such an amendment is "defined and fixed" in that it is "unalterable" by either state or federal legislators. Because Amendment 73 involves no congressional interference with suffrage or candidacy, it is consistent with the letter of Article I and with the spirit of popular sovereignty that animates Article I.

IV. Amendment 73 does not reduce the choices available to future electorates in Arkansas, because, by eliminating government-conferred advantages of incumbency, Amendment 73 increases the availability of viable challengers who would otherwise be excluded.

Several commentators have expressed concern that, by enacting Amendment 73, a temporary majority of

²⁰ This interpretation of Hamilton's argument is supported by Madison's remarks in *Federalist No. 52*. Madison notes that, because "the right of suffrage is . . . a fundamental article of republican government," the U.S. Constitution had to "define and establish" qualifications for electors. James Madison, *Federalist No. 52*, in *The Federalist Papers* 326 (Clinton Rossiter ed. 1961). According to Madison, these qualifications are sufficiently defined because they are defined in the states' constitutions and cannot be altered by state or federal legislators.

Arkansas voters have deprived future electorates in Arkansas of the power to choose incumbents.²¹ According to this criticism, term limit measures like Amendment 73 violate the principle of popular sovereignty implicit in *Powell* because they allow present electorates to foreclose options that future electorates might wish to adopt.

Given that both Article I, § 2 and the Seventeenth Amendment require periodic elections, this criticism is a legitimate source of concern. A temporary majority of voters ought not to be able to exclude future majorities from choosing freely their own representatives. However, on proper analysis, this concern is misplaced, for two reasons.

First, the Arkansas electorate has not barred future majorities from repealing Amendment 73: the measure can be repealed through a simple majority vote. Therefore, no permanent exclusion of incumbents has been imposed on future electorates, and any future electorate can exercise its power under Article I, § 2 and the Seventeenth Amendment to choose incumbent legislators simply by voting to repeal Amendment 73.

Second, Amendment 73 actually eliminates one obstacle to competitive elections and the presentation of a full range of candidates to the electorate: by excluding incumbents from the ballot, Amendment 73 prevents incumbents from using government-conferred resources to eliminate viable challengers to the incumbents. As explained below, by counteracting some of the government-conferred benefits of incumbency, Amendment 73 is just as likely to increase choices available to future electorates as contract them.

²¹ See, e.g., Jonathan Mansfield, *A Choice Approach to the Constitutionality of Term Limitation Laws*, 78 Cornell L. Rev. 966 (1993).

A. Government-conferred benefits of incumbency prevent future electorates from electing non-incumbent candidates.

It is widely recognized by political scientists that incumbent congresspersons generally defeat challengers.²² Indeed, incumbents have been re-elected to the House of Representatives on average about 90% of the time since the end of World War II,²³ and Senators have been re-elected roughly 70% of the time since direct elections began in 1913.²⁴ In 1986, 98% of incumbents in the House of Representatives were re-elected.²⁵ Moreover, it is also widely recognized that,

²² The literature on the advantages of incumbency is enormous. For summaries, see Richard S. Beth, *Incumbency Advantage and Incumbency Resources: Recent Articles*, 9 Cong. & Presidency 119 (1984) and Richard S. Beth, *Recent Research on Incumbency Advantage in House Elections: Part II*, 11 Cong. & Presidency 211 (1984). See also Gary King, *Constituency Service and Incumbency Advantage*, 21 Brit. J. Pol. Sci. 119, 119 & n.1 (1991) (listing articles on incumbent advantage); Candice Nelson, *The Effect of Incumbency on Voting in Congressional Elections, 1964-1974*, 93 Pol. Sci. Q. 665 (1978).

²³ Morris Fiorina & David Rohde, *Richard Fenno's Research Agenda and the Study of Congress*, in *Home Style and Washington Work: Studies of Congressional Politics* 9 (Fiorina & Rohde eds. 1989); Thomas E. Mann, *Is the House of Representatives Unresponsive to Political Change?*, in *Elections American Style* 261 (A. James Reichley, ed. 1987).

²⁴ It is widely recognized that Senate elections are more competitive than House elections. See, e.g., Morris Fiorina, *Congress: Keystone of the Washington Establishment* 115-118 (2d ed. 1989) [hereinafter Fiorina, *Keystone*]. However, senators still benefit from incumbency, *Id.* at 27-28, and they are re-elected roughly 70% of the time. See David C. Huckabee, *Re-Election Rates of Senate Incumbents 1790-1988* (Cong. Research Serv.: Gov't Div. 1990).

²⁵ Thomas E. Mann, *Is the House of Representatives Unresponsive to Political Change?*, in *Elections American Style* at 261.

since the mid-1960s, incumbents have been prevailing over challengers by ever-widening margins of victory²⁶; the margin by which incumbents defeated challengers increased by about 5% during the 1970s.²⁷

If incumbent congressmen defeated challengers simply because the electorate preferred incumbency over inexperience, then the advantage enjoyed by incumbents would be a matter of no constitutional significance. However, the undisputed and widely recognized facts indicate that the advantage enjoyed by incumbents is not simply the result of incumbent popularity with the electorate.²⁸ Rather, incumbent advantage is created, at least in part, by the benefits conferred upon incumbents by Congress. Crucial among these advantages are the franking privilege, the use of staff to cultivate relations with the constituency, travel funds,

²⁶ David Mayhew originally described how fewer incumbents were prevailing by low margins of victory in *Congressional Elections: The Case of the Vanishing Marginals*, 6 Polity 295 (1974). See also Fiorina, *Keystone* at 48-52 (describing nature and magnitude of incumbency effect).

²⁷ As Gary Jacobson has noted, it does not follow from the disappearance of close races and the increase of incumbent vote share that there is a lower rate of turnover in congressional elections. Because volatility of voting has also increased, incumbents in the House of Representatives win by larger margins but no more often than in the 1960s – that is, about 90% of the time. See Gary C. Jacobson, *The Marginals Never Vanished: Incumbency and Competition in Elections to the U.S. House of Representatives, 1952-1982*, 31 Am. J. Pol. Sci. 126 (1987). See also Stephen Ansolabehere, David Brady, & Morris Fiorina, *The Vanishing Marginals and Electoral Responsiveness*, 22 Brit. J. Pol. Sci. 21, 23-27 (1992) (describing and analyzing Jacobson's data and conclusions); Thomas Mann, *Is the House Unresponsive to Change?*, in *Elections American Style* at 264-66.

²⁸ See Fiorina, *Keystone* at 25-27.

offices in the incumbents' district, Congressional broadcast studios.²⁹

According to Fiorina's influential analysis of Congress, with the decline of political parties, candidates have had to assemble resources to replace those resources that partisan organizations used to provide – money, publicity, local offices, and organizations, etc.³⁰ Incumbents have obtained these resources from Congress, which provides staff, local offices, travel funds, franking privileges, and other monetary resources to its members.³¹ Challengers, however, do not receive such resources, and, as a result, they are systematically at a competitive disadvantage against incumbents.³²

Congress has also made seniority into an asset for incumbents. Since the 1910 House revolt against House Speaker Joseph Cannon, Congress has increasingly emphasized seniority in making committee and subcommittee assignments.³³ The more senior members have greater

²⁹ See Fiorina, *Keystone* at 53-63. Thomas Mann notes that incumbents succeeded in winning votes "largely by utilizing the increased resources at their disposal (staff, the franking privilege, travel funds, and House television and radio stations) to cultivate their districts." Thomas Mann, *Is the House Unresponsive to Change?*, in *Elections American Style* at 263-64. See also Albert Cover, *One Good Term Deserves Another: The Advantage of Incumbency in Congressional Elections*, 21 *Am. J. Pol. Sci.* 523 (1977). In 1975, the monetary value of these benefits was estimated to equal about \$500,000. Herbert Alexander, *Financing Politics: Money, Elections, and Political Reform* 55 (1976).

³⁰ Fiorina, *Keystone* at 112-115.

³¹ The operating budget for each member of the House of Representatives has doubled in the last ten years. Norman J. Ornstein, Thomas E. Mann, & Michael J. Malbin, *Vital Statistics on Congress, 1989-1990* 144 (1990).

³² Fiorina, *Keystone* at 20.

³³ Nelson Polsby, *The Institutionalization of the House of Representatives*, 62 *Am. Pol. Sci. Rev.* 144, 156 (1968).

opportunities to occupy the most desirable subcommittee assignments – those assignments that most enable the incumbent to benefit his or her district through effective casework or through "pork barrel" spending – expenditures on specific projects located within the district. By voting for a challenger, constituents would, by definition, elect a representative without seniority. But, without such seniority, the representative would be less effective. In effect, Congress would "fine" the electorate for voting against an incumbent.³⁴

Beyond these specific benefits for incumbents, evidence suggests that Congress deliberately structures legislation to increase demand in those services that incumbents can best supply: casework for constituents and district-specific spending measures. Rather than vote for legislation containing specific policy proposals, Congress creates agencies to administer vaguely defined programs under nebulous standards – programs that increase the opportunities for incumbents to engage in ombudsman services for constituents aggrieved by bureaucratic action. By intervening with the bureaucracy, the incumbent wins the gratitude of the constituent and provides "unsticking" services that challengers by definition cannot extend.³⁵

Again, if demand for these ombudsman services were independent from Congressional action, they would not be problematic: incumbents are, after all, supposed to provide services demanded by constituents in a democratic system.

³⁴ Hills, *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 *U. Pitt. L. Rev.* at 144-45.

³⁵ Fiorina, *Keystone*, at 37-47; Bruce Cain, John Ferejohn, & Morris Fiorina, *The Personal Vote: Constituency Service and Electoral Independence* 123 (1987). For an attempt to verify the relation between constituency service and re-election, see Gary King, *Constituency Services and Incumbency Advantage*, 21 *Brit. J. of Pol. Sci.* 119 (1991).

However, research suggests that Congress deliberately increases the need for such services by enacting vague legislation in order to create larger opportunities for individual Congresspersons to intervene with bureaucracies on behalf of constituents.³⁶

Voters are deprived of viable alternative candidates – of genuine electoral choices – by this system of incumbent protection. Viable candidates are frequently driven off by the resources at an incumbent congressperson's disposal. The challengers who run are often weak, underfunded, inexperienced, and poorly organized.³⁷

In effect, Congress' efforts to insulate incumbents from electoral challenges are the mirror image of Congress' effort in *Powell* to exclude candidates elected by local constituents. In the former case, Congress excludes the candidates that the constituency prefers. In the latter case, Congress promotes the candidate – the incumbent – that the constituency might not prefer. In either case, Congress places its thumb on the

³⁶ See Fiorina, *Keystone* at 37-47.

³⁷ For several accounts of the ability of incumbents to scare off serious challenges, see Thomas A. Kazee, *The Deterrent Effect of Incumbency on Recruitment in Congressional Elections*, 8 *Legis. Stud. Q.* 469, 478 (1983) (noting that "the battle for incumbent re-election is largely won – well before the campaign even begins" because viable challengers are discouraged by incumbents' perceived advantages); Fiorina, *Keystone* at 100-101; Lyn Ragsdale, *Incumbency Popularity, Challenger Invisibility, and Congressional Voters*, 6 *Legis. Stud. Q.* 201, 209-10 (1981) (noting that "most voters do not perceive a contest between incumbents and challengers in House races"); Barbara Hinckley, *The American Voter in Congressional Elections*, 74 *Am. Pol. Sci. Rev.* 641, 643 (1980); Gary Jacobson, *Incumbents' Advantages in the 1978 U.S. Congressional Elections*, 6 *Legis. Stud. Q.* 183, 198 (1981); Thomas E. Mann & Raymond Wolfinger, *Candidates and Parties in Congressional Elections*, in *Controversies in Voting Behavior* 290 (Richard Niemi & Herbert Weisberg eds. 1984).

scale of the electoral process and prevents elections from being an accurate measure of public opinion.³⁸

By enacting Amendment 73, Arkansas voters have attempted to neutralize some of the government-conferred benefits of incumbency and allow future electorates to have the option of electing viable candidates who are not incumbent legislators. Prior to 1910, voters routinely imposed "rotation" – term limits – on federal legislators simply by voting against incumbents who had served for long periods of time.³⁹ However, where incumbents enjoy government-conferred benefits and can eliminate or drown out effective and viable challengers, this method of rejecting incumbents is simply not practical: the incumbents' advantages create a paucity of tolerable or effective alternatives to the incumbent legislator.

Therefore, Amendment 73 cannot be found unconstitutional on the ground that it limits the choices available to future electorates. It is true that Amendment 73 affects future electorates by making it more difficult to re-elect incumbents. However, the decision by voters to re-elect an incumbent also affects future electorates, because such a decision bestows government resources on the incumbent and allows the incumbent to drive away effective challengers. In either

³⁸ See Hills, *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 *U. Pitt. L. Rev.* at 145.

³⁹ See, e.g., Michael Ostrogorski, *Democracy and the Party System in the United States: A Study in Extra-Constitutional Government* 129 (1912) (noting that "[c]ustom has fixed a maximum of occupation for each [elected] office" in the United States); Mark Petracca, *Rotation in Office: The History of an Idea*, in *Limiting Legislative Terms* 19 (Gerald Benjamin & Michael Malbin eds., 1992); Nelson Polsby, *The Institutionalization of the House of Representatives*, 62 *Am. Pol. Sci. Rev.* 144, 146 (1968) (describing congressional turnover during 19th century).

case, the choice of the present electorate will affect the choices available to future electorates.

The issue in this case is whether Amendment 73 limits future electorates' choices *more* than the status quo absent Amendment 73. Nothing in the record of this case indicates that Amendment 73 so limits voter choice. Therefore, this Court cannot strike down Amendment 73 on the ground that it imposes the views of a present majority of Arkansas voters on future electorates.

B. The U.S. Constitution permits the people of Colorado to limit candidacy of incumbents in order to prevent government-conferred political advantage from reducing competition in elections.

The people of Arkansas are permitted to curb the advantage enjoyed by incumbents in order to prevent incumbents from drowning out other political voices. Such restriction of incumbent political activity is permissible because the advantages of incumbency are, in part, the creation of government. This Court has long held that state and federal law may restrict candidacy and political activity in order to curb the advantage that political actors may obtain from government-conferred benefits. Where political advantage "ha[s] little or no correlation to the public's support for the [advantaged entity's] political ideas," but rather is the result of state-conferred benefits, then the Supreme Court has upheld state restrictions on political activity. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659-660 (1990). In effect, such regulation redresses an imbalance of power itself created by government regulation or subsidy: it simply restores the status quo that would exist absent a distortion in the political marketplace caused by government intervention favoring one political interest over others.

Invoking the principle that government may mitigate institutional advantage that government creates, this Court

has upheld exclusions of potential candidates from political activity far more far-reaching and restrictive than Amendment 73. In *United States Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973), for instance, this Court upheld the constitutionality of the "Hatch Act," a statute that prohibits federal employees from taking "an active part in political management or political campaigns," *Letter Carriers*, 413 U.S. at 550, which the statute's implementing regulations construed to include "'[b]ecoming a partisan candidate for, or campaigning for, an elective office.'" *Id.* at 578 n.21 (quoting 5 C.F.R. § 733.122(b)(6)).

In affirming this statute, this Court noted that the statute served a compelling interest in preventing incumbent parties from entrenching themselves in office with the aid of government employees. According to this Court,

Another major concern of the restriction against partisan activities by federal employees was perhaps the immediate occasion for enactment of the Hatch Act in 1939. That was the conviction that the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine. The experience of the 1936 and 1938 campaigns convinced Congress that these dangers were sufficiently real that substantial barriers should be raised against a party in power . . . using the thousands . . . of federal employees, paid for at public expense, to man its political structure and political campaigns.

Letter Carriers, 413 U.S. at 565-66. Therefore, the Court upheld a statute that prevented federal employees from running for any political office whatsoever.

By contrast with the Hatch Act, Amendment 73 is an extremely limited restriction on the number of candidates that can be presented to the voters for consideration. Amendment 73 bars a very small class of federal employees (incumbent representatives who have served three terms or senators who have served two terms) from being placed on

the ballot for re-election to the positions that they currently hold. Amendment 73 allows the affected class of candidates to run for any other office. By any measure, Amendment 73 is a less draconian restriction on the choice of candidates presented to the electorate than the Hatch Act upheld in *Letter Carriers* and should be upheld for similar reasons.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the decision of the Arkansas Supreme Court.

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In The
Supreme Court of the United States
October Term, 1994

U.S. TERM LIMITS, INC., *et al.*,

Petitioners,

v.

RAY THORNTON, *et al.*,

Respondents.

STATE OF ARKANSAS *ex rel.* WINSTON BRYANT,
Attorney General of the State of Arkansas,

Petitioner,

v.

BOBBIE E. HILL, *et al.*,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Arkansas

BRIEF OF AMICI CURIAE, PEOPLE'S ADVOCATE,
INC. AND NATIONAL COMMITTEE TO LIMIT
TERMS IN SUPPORT OF PETITIONERS'
BRIEFS ON THE MERITS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED.....	iii
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	4
I. THE TENTH AMENDMENT RESERVES TO THE PEOPLE OF EACH STATE THE POWER TO LIMIT THE TERMS OF OFFICE OF THEIR CONGRESSIONAL REPRESENTATIVES	4
A. THE POWER OF THE PEOPLE TO LIMIT TERMS IS HISTORICALLY DERIVED ...	6
1. <i>Popular Sovereignty is the Heart of Representative Government.....</i>	<i>6</i>
2. <i>The Peoples' Power to Limit Terms Predates the Constitution</i>	<i>8</i>
B. IF THE STATES HAVE NO POWER TO LIMIT TERMS UNDER U.S. CONST., ART. I, § 4, cl. 2, THEN NEITHER DOES CONGRESS AND NO OTHER CONSTITUTIONAL PROVISION DELEGATES THAT POWER TO CONGRESS	9
C. THE POWER TO LIMIT TERMS IS NOT PROHIBITED TO THE STATES.....	12
1. <i>The Constitution Did Not Divest the People of Their Pre-Constitutional Powers Over Their Delegates</i>	<i>12</i>
2. <i>Amendment 73 is not Barred by the Qualifications Clauses</i>	<i>13</i>

TABLE OF CONTENTS - Continued

	Page
II. THE POWER OF THE PEOPLE TO LIMIT TERMS DOES NOT OFFEND, BUT ABSOLUTELY PROMOTES, CONSTITUTIONAL PRINCIPLES	16
III. TERM LIMITATIONS SERVE SUFFICIENTLY IMPORTANT INTERESTS OF THE PEOPLE TO SUSTAIN THEIR CONSTITUTIONALITY	20
CONCLUSION	21

TABLE OF AUTHORITIES

Page

CASES

<i>American Federation of Labor v. Eu</i> , 36 Cal.3d 687 (1984)	19
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	9
<i>Burdick v. Takushi</i> , 504 U.S. ____ (1992)	9-10
<i>Furman v. State of Georgia</i> , 408 U.S. 238 (1972)	7
<i>Garcia v. San Antonio Metropolitan Transit Authority</i> , 469 U.S. (1985)	19
<i>Gregory v. Ashcroft</i> , 501 U.S. ____ (1991)	5
<i>Jenness v. Fortson</i> , 403 U.S. 431 (1971)	9-10
<i>Munro v. Socialist Workers Party</i> , 479 U.S. 189 (1986)	9-10
<i>Powell v. McCormack</i> , 395 U.S. 486 (1968)	11, 14, 16
<i>State of South Carolina v. Baker</i> , 485 U.S. 505 (1988)	20
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	13, 14
<i>United States v. Darby</i> , 312 U.S. 100 (1941)	11

CONSTITUTIONAL PROVISIONS

U.S. Constitution,

Article I, § 2	13, 16, 18
Article I, § 3	13, 17
Article I, § 4	9
Article I, § 5	11

TABLE OF AUTHORITIES – Continued

Page

Article V	4, 5, 8, 13, 17
Tenth Amendment	<i>passim</i>
Seventeenth Amendment	17, 18
Nineteenth Amendment	18
Ark. Const., Amend. 73	4-5
Ga. Const. (1785)	6
Ga. Const. art I, sec. 2-101	6
Wis. Const. art 13, § 12	12

OTHER

Declaration of Independence, July 4, 1776	6
Virginia Bill of Rights	8
The Federalist (E. Earle ed. 1937)	
No. 42	15
No. 52	14
No. 59	10
No. 60	10

ARTICLES AND PUBLICATIONS

Flexner, E., <i>Century of Struggle</i> (1975)	18
Haynes, G., <i>The Election of Senators</i> (1906)	17
Hills, R., Jr., <i>A Defense of State Constitutional Term Limits on Federal Congressional Terms</i> , 53:97 Univ. Pittsburgh Law Rev. 118 (1991)	15

TABLE OF AUTHORITIES – Continued

Page

Messonnier, T., <i>A Neo-Federalist Interpretation of the Tenth Amendment</i> , 25:1 Akron Law Rev. 237-240 (1991)	13
Safranek, S., <i>Term Limitations: Do the Winds of Change Blow Unconstitutional?</i> , 26 Creighton Law Rev. 355-356 (1993)	14
Wilson, J., <i>The Rights Retained by the People</i> , Randy Barnett (ed.), Vol 2, p. 335 (1993)	6-7

INTEREST OF AMICI

People's Advocate, Inc. is a non-profit public benefit California corporation founded in 1974 by the late Paul Gann and is dedicated to the promotion of government reform through populist activism via the powers reserved to the people, i.e., the initiative process. In the twenty years since its establishment, People's Advocate has sponsored 15 state-wide ballot initiatives proposed by petition of the people, including Proposition 13, the famous Jarvis-Gann property tax initiative. People's Advocate is governed by an elected five-member Board of Directors, one of which is a direct descendent of James Madison. Currently, People's Advocate has 171,000 members and contributors who support its goals and an additional 420,000 households on its mailing list throughout the United States.

National Committee to Limit Terms (NCLT) was founded in 1990 as a special project of People's Advocate and is governed by a three-person Board of Directors appointed by the directors of People's Advocate. The primary mission of NCLT is to promote state and congressional term limits in California and throughout the several states using the initiative process. Since 1990, 117,000 people have asked NCLT to work on their behalf to limit congressional terms.

People's Advocate, by and through another of its special projects, California Committee to Limit Terms (CCLT), marshalled its forces to qualify California Proposition 140, a ballot initiative to limit the terms of state officials, adopted by the voters in 1990. In 1992, CCLT circulated and qualified a ballot initiative (Proposition

164) to limit congressional terms and participated in the ballot arguments. Proposition 164 received over 60% voter approval and is now the law of the State of California.

Since the Arkansas Supreme Court's decision invalidating Amendment 73 to its state constitution, limiting congressional terms, NCLT has received over 7,600 requests from individuals to file an amicus brief on their behalf to uphold the Arkansas constitutional amendment and, by implication, uphold the similarly-phrased California law limiting congressional terms.

Amici's interest in this case arises from their commitment to the principle that the essence of a republican form of government, guaranteed to the States by the Constitution, lies in the powers reserved to the people, who must necessarily act through the state legislative processes available to them. In so addressing, Amici urge this Court to consider the important aspects of public policy embodied in term limitation laws and respectfully urge this court to uphold Amendment 73 to the Arkansas constitution.

SUMMARY OF ARGUMENT

The Tenth Amendment provides an independent constitutional basis to reverse the decision of the Supreme Court of Arkansas.

The peoples' power to limit the terms of their congressional Representatives and Senators is a power

reserved to them under the Tenth Amendment. The Constitution was founded on the principle of popular sovereignty: the people delegated limited powers to the federal government and retained the remainder. One of the expressly retained powers was to elect the representatives of their choice; the power to limit that representation is necessarily implied. The power of the people to limit terms is historically derived; that power predates – and survives – the Constitution.

The Constitution does not delegate to Congress the power to limit the terms of the peoples' representatives. If Ark. Const. amend. 73 is not a ballot restriction permissible under the "time, place, manner clause", then the power of Congress to limit terms is no greater than that of the states. If term limitation is a "qualification", then Congress' only power is to judge, not add, the standing qualifications of its members duly elected by the people.

The Constitution does not prohibit the states from limiting the terms of its congressional representatives. Term limitation is not a qualification. Laws that simply limit ballot access yet provide for write-in candidacy do not disqualify incumbents from serving if elected and such provisions do not affect classes of people. Even if incumbency is a "dis"-qualification, the right to disqualify is founded on the states' retained right to enact – and the peoples' right to exercise – recall provisions.

Not delegated to Congress nor prohibited to the states, the power to limit the terms of their representatives is a power that rests ultimately with the people. But how are the people to exercise their reserved powers within the Constitution? The Framers of the Constitution

could not have intended to provide the people with a vehicle which has no motor or wheels. The Tenth Amendment provides no remedy. The peoples' only mobility is through their vote on a state-by-state basis.

Article V is no bar to the peoples' power to limit the terms of their congressional representatives. Read in context with the Tenth Amendment, the power to amend the Constitution also rests ultimately with the people. That power was not delegated solely to Congress, nor prohibited to the States. The exercise of the popular vote on a state-by-state basis is, as history supports, the only feasible way that the people can effect changes in the Constitution.

ARGUMENT

I. THE TENTH AMENDMENT RESERVES TO THE PEOPLE OF EACH STATE THE POWER TO LIMIT THE TERMS OF OFFICE OF THEIR CONGRESSIONAL REPRESENTATIVES

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to *the people*." *U.S. Const. amend. X*. [Emphasis added]. While the States and the Federal Government are "dual" sovereigns, the sovereignty of the people is ultimate in the entire constitutional context.

The Arkansas Term Limitation Constitutional Amendment (Amendment 73) was a ballot proposal initiated by "petition of the people" and, as stated in its

preamble, was adopted by "the people of Arkansas, exercising their reserved powers."¹

This Court has recognized "the authority of the people of the States to determine the qualifications of their most important government officials . . . is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States 'guarantee[s] to every State in this Union a Republican Form of Government.'" *Gregory v. Ashcroft*, 501 U.S. ___, ___ (1991). The principles espoused in *Gregory* are easily extended to congressional term limitations: the federalist structure was designed to *increase*, not decrease, the opportunity for citizen involvement in democratic processes and to allow *more*, not less, innovation and experimentation in government.

The power of the people to limit the terms of their own representatives lies at the heart of representative democracy. *Amici* take the position that term limitation, on a state-by-state basis, especially by laws that only regulate ballot access, is a power reserved to the people of each state. This position is not contrary to the constitutional amendment provision of Article V whereby uniform provisions for term limitation on a national level would be achieved. But until and unless a term limitation amendment to the Constitution is proposed and ratified, that power is not delegated and is reserved to the people.

¹ See text of ballot proposal.

A. THE POWER OF THE PEOPLE TO LIMIT TERMS IS HISTORICALLY DERIVED

1. Popular Sovereignty is the Heart of Representative Government

The entire political theory of the Constitution from its origins to its adoption is based upon the will of the people. When the Second Continental Congress met in May, 1775, it was composed of "delegates" sent by the people who viewed their right of "legislative representation" as "inestimable" and that government could only derive its just powers from the "consent of the governed". See, Declaration of Independence, July 4, 1776.

Popular sovereignty was a common feature of the revolutionary states' constitutions where constitutions were adopted by conventions of the people. One example is the Georgia constitution of 1785² which states:

"We, therefore, the representatives of the people, from whom all power originates and for whose benefit all government is intended, by virtue of the power delegated to us, do ordain . . ."

Regarding the people's sovereign right and power to alter their government as the very foundation of our Constitution, James Wilson insisted:

² (Source: Constitutions of the States, Georgia); by 1877, after the Civil War, the Georgia Constitution still read: "All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people, and, at all times, amenable to them." Ga. Const. art. I, sec. 2-101.

"The truth is, that, in our governments, the supreme, absolute and uncontrollable power *remains* in the people. As our constitutions are superior to our legislatures; so the people are superior to our constitutions. Indeed the superiority, in this last instance is much greater; for the people possess, over our constitutions control in *act*, as well as in right." *The Rights Retained by the People*, Randy Barnett (ed.), Vol. 2, p. 335 (1993).

From its preamble to its tenth and final "bill of right", the Constitution begins and ends with "*the people*". Aptly stated,

"Sovereignty resides ultimately in the people as a whole and, by adopting through their States a written Constitution for the Nation and subsequently adding amendments to that instrument, they have both granted certain powers to the National Government, and denied other powers to the National and the State Governments. . . . For the theory is that the people themselves have spoken in the Constitution, and therefore its commands are superior to the commands of the legislature, which is merely an agent of the people." *Furman v. State of Georgia*, 408 U.S. 238, 466 (1972) (J. Rehnquist, dissenting).

Certainly, the power of the people of a state to limit the terms of their own representatives in Congress is reserved to them if (a) the power to limit terms is not delegated to Congress and (b) the power to limit terms is not prohibited to the States.

2. The Peoples' Power to Limit Terms Predates the Constitution

The power to limit the terms of their congressional delegates was vested in the states prior to the adoption of the Constitution. The colonies recognized that the people had a *right* to be free from the oppression of entrenched incumbency and that legislative representatives should experience the burdens of the people they represent and, after a limited service, return to the private sector and live under the laws they had enacted. The Virginia Bill of Rights, adopted June 12, 1776, states:

"A declaration of rights made by the representatives of the good people of Virginia . . . which rights do pertain to them and their posterity, as the basis and foundation of government.

SECTION 5. That the legislative and executive powers of the State should be separate and distinct from the judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to private station, return into that body from which they were originally taken, and the vacancies supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct."

The same Virginia resolution that proposed independence asked Congress to prepare a plan for the confederation of states. Under the provisions of Article V, states appointed their delegates annually "with a power

reserved to each state, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the Year". Additionally, no delegate could serve "more than three years in any term of six years". The Articles of Confederation proposed by Congress were not effective until ratified by *all the states* through conventions of the people.

Hence, the states' pre-Constitutional power can be summarized as: (1) *the absolute power to choose* their representatives; (2) *the absolute power to recall or disqualify* a delegate from service, and (3) *the ultimate power over term limitation*. The question remains whether, through adoption of the Constitution, the States, or its people, have relinquished the powers it had prior to its adoption.

B. IF THE STATES HAVE NO POWER TO LIMIT TERMS UNDER U.S. CONST., ART I, §4, CL. 2, THEN NEITHER DOES CONGRESS AND NO OTHER CONSTITUTIONAL PROVISION DELEGATES THAT POWER TO CONGRESS

U.S. Const., Art. I, §4, cl. 2 gives states the primary right to prescribe laws regulating the time, place and manner of elections for senators and representatives. Petitioners argue that Amendment 73 is a ballot access restriction authorized under Art. I, §4, cl. 2. *Amici* agree.

States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). This Court has always recognized the states' rights to impose reasonable ballot access

restrictions that do not otherwise abridge the constitutional rights of voters, candidates or political parties. See, e.g., *Burdick v. Takushi*, 504 U.S. ____ (1992); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); *Jenness v. Fortson*, 403 U.S. 431 (1971).

As noted by Alexander Hamilton, this broad provision was designed to allow for "probable change in the situation of the country". The Federalist No. 59, p. 384 (E. Earle ed. 1937). Hamilton further describes the "chimerical" dangers of giving absolute power over federal elections to Congress:

"that it [abuse] could never be made without causing an immediate revolt of the great body of the people - headed and directed by state governments. It is not difficult to conceive that this characteristic right of freedom may . . . be violated . . . but that so fundamental a privilege . . . should be invaded to the prejudice of the great mass of the people . . . without occasioning a popular revolution, is altogether inconceivable and incredible. The Federalist, No. 60, pp. 389-390. (E. Earle ed. 1937).

Nor would it be consistent with the Constitutional principle of popular sovereignty if Congress were allowed unilaterally to impose laws on the people instructing them who may or may not appear on their ballot.

The states' power is primary. Congress' role is one of preservation of government; it can only act when "extraordinary circumstances might render that interposition necessary to its safety". The Federalist, No. 59, pp. 384-385. (E. Earle ed. 1937). The term limitation provisions in Amendment 73 (and in the laws of other states,

including California) cannot be said to threaten the "safety" of Congress unless its safety lies in the incumbency of its members.

If term limitations by state action are not viewed permissible under the "time, place, manner clause", then Congress has no delegated power pursuant to this clause either. Moreover, no other Article I power can logically be extended to delegate the power to limit terms to Congress.

If, on the other hand, term limitation is viewed as a "qualification", then Congress' only power is to *judge* the standing of its members, pursuant to U.S. Const. art I, §5. It has no power to add additional qualifications for those members who have already been *duly elected by the people*. *Powell v. McCormack*, 395 U.S. 486, 522, 550 (1968). *Powell* is not determinative of the issues before the court in this instance. Firstly, that holding was limited to the power of Congress, not the states or the people. Secondly, the Court recognized the right of the people to elect the candidate of their choice.

As already mentioned, Congress *could* seek to amend the Constitution, but there is no "power" to limit terms until it is "delegated" by state ratification. The "truism" that all is retained which has not been surrendered (*United States v. Darby*, 312 U.S. 100, 124 (1941)) is never more true than when, by and through the amendment process, states (and the people) give up and further delegate their Tenth Amendment reserved powers. But until such delegation of power, the power to limit terms, if not prohibited to the States, is reserved to the people.

C. THE POWER TO LIMIT TERMS IS NOT PROHIBITED TO THE STATES

1. The Constitution Did Not Divest the People of Their Pre-Constitutional Powers over Their Delegates

The states' power to appoint and recall their representatives continued after their ratification of the Constitution. Although later amended to provide for senators elected by popular vote, the Constitution adopted in 1789 provided for senators appointed by state legislatures and representatives elected pursuant to state election laws.

Recall provisions are still found in many state constitutions, some of which allow popular recall of congressional members. For example, Wisconsin provides that "the qualified electors of the state, of any *congressional*, judicial or legislative district or of any county may petition for the recall of an incumbent elective office" Wis. Const. art 13, § 12. [Emphasis added].³ Unfortunately, the recall provisions no longer serve as an effective means of controlling incumbency. Prior to the Constitution, delegates received their appointments from state legislatures who, more easily and with less hoopla, could recall the delegate and for any reason. With the shift to representation by popular election, recall procedures must be initiated by petition of the people with the attendant taxpayer expenses of recall elections and re-elections and, in most instances, sufficient grounds for removal is required.

³ Similar provisions are found in the laws of Montana, Utah, Arizona, Colorado, N. Dakota, Kansas, Washington, and Oregon (list not exclusive).

States also retained their right of ratification of constitutional amendments. The inclusion of the term "convention" in U.S. Const. art. V was based on the acknowledgment by the Framers that conventions of the people were an integral part of the political process in many states, i.e. a "deliberate majority". Yet reading Article V within the context of the Tenth Amendment does not necessarily mean that Article V is exclusive. The reserved power of the people to amend the constitution by popular vote on a state-by-state basis is not precluded. T. Messonnier, A Neo-Federalist Interpretation of the Tenth Amendment, 25:1 Akron Law Rev. 237-240 (1991).

2. Amendment 73 is not Barred by the Qualifications Clauses

Amendment 73 is not impermissible under the qualification provisions of U.S. Const. art. I, § 2, cl. 3 (representatives) and § 3, cl. 3 (senators). Amendment 73 – and similar laws enacted in the several states, including California – do not prevent anyone from campaigning for election and serving if elected under the write-in provisions of the elections laws.

In *Storer v. Brown*, 415 U.S. 724 (1974), this Court upheld the constitutionality of a California election law under which ballot access was denied to two independent candidates for Congress who had a registered affiliation with a qualified party within a specific time before the primary election. The Court held that states have the broad powers to regulate regarding the selection *and qualifications* of candidates to be placed on a ballot and noted that this is especially true where states have an

interest in limiting ballot access to insure the stability of the political system. *Id.* at 730, 736.

Also, term limitation is not a qualification because, unlike age, citizenship and residency, it is specifically related to the service one person has done for his or her state. Lengthy service in Congress is not likely to apply to many people; it does not affect classes of persons, only a small number of individuals. S. Safranek, *Term Limitations: Do the Winds of Change Blow Unconstitutional?*, 26 Creighton Law Rev. 355-356 (1993).

Even if characterized as a "qualification", the questions remain: who, if anyone, may add or subtract and how should the changes be made?

Under the *Powell* decision, *supra*, Congress has no independent power to add or subtract qualifications; they must act by proposing amendments. But although the intent of the Framers may have been to exclude Congress' ability to unilaterally qualify its members, there is no such expressed intent to deny that power to the state or the people.

The purpose of the qualifications clause was to "open merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith." See, *The Federalist* No. 52, pp. 342-343 (E. Earle ed. 1937). (Madison). It was, at least (and at best), an *attempt* at uniformity, where state-enacted qualifications for its own elected officials were often based on property holdings, wealth, and religion.

However, when the qualifications clauses were adopted, "citizenship" and "inhabitaney" were determined under *state* law. The "dissimilarity in the rules of naturalization" among the states was noted by Madison:

"In one State residence of a short term confers all the rights of citizenship. In another qualifications of greater importance are required. An alien therefore legally incapacitated for certain rights in the latter, may by previous residence only in the former, elude this incapacity . . ."
The *Federalist* No. 42, p. 77 (E. Earle ed. 1937).

Madison urged the "general government" to establish a uniform rule of naturalization. But even after Congress enacted a uniform naturalization law in 1795, birthright citizenship (Native Indians and Blacks) was still dependent on *state* law, as was repatriation to state citizenship after absence from the state. R. Hills, Jr., *A Defense of State Constitutional Term Limits on Federal Congressional Terms*, 53:97 Univ. Pittsburgh Law Rev. 118 (1991).

Incumbency, to the Framers, was not a social evil of the times. Although term limitation provisions were included in the Articles of Confederation, delegates were reluctant to travel distant miles and serve long terms. The Framers saw stability in government as necessary to a new nation. Moreover, the Constitution is a system of checks and balances. The appointment power of the states (senators) was balanced with the election power of the people (representatives). The Framers' decision not to include in the Constitution a provision to limit incumbency was "checked" by the states' right not to reappoint a senator and the frequent election provisions for representatives.

Powell did not address the issue of whether the *people* could "add" qualifications. U.S. Const. art. I, § 2, cl. 1, expressly empowers the people to choose the members of the House of Representatives. This important concept underlies the *Powell* holding because Mr. *Powell* had been *duly elected by the people*.

Amici point out that if, in 1966, the state of New York had a recall provision similar to that of Wisconsin, cited *supra*, the voters of the 18th Congressional District of New York could have petitioned for Mr. *Powell's* recall and, thus, could have imposed an additional "qualification" relating to moral turpitude. Likewise, it would be within the power of the New York state legislature to enact recall provisions. If a state, through its recall provision could add a "qualification" that would, in practice, affect one, or a few, incumbents, then it is not prohibited by the Constitution from so doing.

The power to limit terms, therefore, not being delegated to Congress, and not constitutionally prohibited to the states, is reserved to the people.

II. THE POWER OF THE PEOPLE TO LIMIT TERMS DOES NOT OFFEND, BUT ABSOLUTELY PROMOTES, CONSTITUTIONAL PRINCIPLES

Respondents (and other opponents of the initiative process) would urge this Court that term limitation is *exclusively* a matter for constitutional amendment, i.e., that it is a matter for Congress and the States – not the

people. This argument completely ignores the principle of popular sovereignty recognized as the foundation of the Constitution, under which U.S. Const. art. V *must* be read *in conjunction* with the Tenth Amendment.

Amendment 73 to the Arkansas Constitution is not federal action or state action – it is people action. If there is any potency to the principle of popular sovereignty, the question is: how may the people exert their sovereign power? Where is their vehicle and which road will lead to change?

History shows that the people could effectuate change by resorting to revolutionary or civil war. History also shows that the people can effectuate change by exercising their rights in the political process.

As drafted – and until 1912 – U.S. Const. art. I, § 3, cl. 1 provided: "The Senate of the United States shall be composed of two senators for each State, *chosen by the legislature thereof*, for six years; and each senator shall have one vote." After the ratification of Amend. XVII, senators were elected by popular vote.

The history of the long struggle of the people to achieve a voice in the election of their senators is extensively reviewed in G. Haynes, *The Election of Senators* (1906). According to that author, a petition for an amendment to provide for popular elections for senators was first approved by the House of Representatives in 1893, after several previous unsuccessful attempts. However, the Senate failed to approve the proposal. Meanwhile, the national parties began to put the issue at the forefront of their conventional platforms, first appearing in the People's Party in 1892 and in the Democratic Party in 1900.

But the people could not wait for legislative reform. Starting with Nebraska in 1875, followed by Nevada in 1899 and Oregon in 1901, on demand of the people of those states, laws were adopted to provide for popular election of Senate candidates, which the states would then "appoint" according to the letter of the Constitution. By 1906, the legislatures of thirty-two states had taken some kind of formal action. It was not until the gradual infiltration of the Senate by "elected-appointed" senators comprised close to a $\frac{2}{3}$ majority that Amendment XVII passed.

Noteworthy here is that states, while abiding by the "letter" of the Constitution, had interpreted its "spirit" as that of the people's right to choose their own way of *qualifying* a Senator for appointment by the state.

Another poignant example of grassroot efforts effecting constitutional change is found in the history of women's suffrage. Only because the determination of the qualifications of electors was absolutely granted to the states in U.S. Const. art. I, § 2, cl. 1, and not the federal government, did women get the right to vote. Wyoming was the first state to recognize women's suffrage in 1870 and, by 1918, twenty states allowed women to vote in the next presidential election of 1920 (which constituted 237 electoral votes). E. Flexner, *Century of Struggle* (1975). In recognition of the will of the people, Congress finally adopted Amendment XIX in 1919 which, after ratification by the states, allowed all women to vote in the 1920 Presidential election.

These two examples suggest that term limitation on a state-by-state basis will, in due (if not record) time, lead

to a constitutional amendment. The states with term limitations in place thus far already comprise approximately 37% of the House of Representatives.⁴

If not allowed to proceed on a grassroots level on a state-by-state basis, the people have little remedy. At least one high Court has held that voters cannot petition their legislature, through the initiative process, to call for an Article V constitutional convention. *American Federation of Labor v. Eu*, 36 Cal.3d 687 (1984). People are either denied participation in the "national political process" or that process has failed the people. See, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 555, 557 (1985). Although it is arguably authorized under the Tenth Amendment powers reserved to the people, and the First Amendment right to petition the government for redress of grievances, through an initiative on the national level, Congress has never enacted a procedure for doing so or the means to make the petition binding.

The process has also failed voters at the polls: long-term incumbency has induced voter apathy with a lower and lower percent of voter turnout at every major election. *Amici* grassroots organizations actively solicit voter responses on the issue of term limitations: voters repeatedly express their feeling that voting, especially in a primary election, for the candidate of their choice will not matter – as these candidates are often underfinanced and, therefore, without equal access to the media.

⁴ Like the "appointed-elected" senators, one might safely assume that when the needed majority are term-limited, they will endeavor more vigorously to limit the terms of all.

The Tenth Amendment is implicated when the "national political process" operates in such a defective manner. *State of South Carolina v. Baker*, 485 U.S. 505, 513 (1988).

III. TERM LIMITATIONS SERVE SUFFICIENTLY IMPORTANT INTERESTS OF THE PEOPLE TO SUSTAIN THEIR CONSTITUTIONALITY

On balance, the peoples' interest in limiting the terms of their congressional representatives far outweighs any real or perceived benefits of long-term incumbency.

Unlimited term incumbents become preoccupied with their own re-election. This distracts them from their responsibilities and they spend less time making legislative decisions for the benefit of the people. Long-term incumbents become too closely aligned with the special interest groups who provide contributions and support for their re-election campaigns. Long-term incumbents are lobbied by these groups for special interest legislation and they, in turn, spend time and taxpayer dollars to lobby each other for the necessary votes for that special legislation, even if that legislation is not in the best interest of constituents, who are disproportionately represented. The actual and perceived corruption of the legislative system has resulted in voter apathy, which is counter-productive in a representative democracy.

Qualified people, unable to match the PAC dollars, are discouraged from seeking office and/or are denied access to the necessary media. This has led to a lack of competitiveness and a decline in robust debate on issues

of importance to the people. Voters are thus unable to vote for the candidates of their choice.

Term limitation restores integrity to the system by curtailing the effects of special interest groups and allowing the elected to serve the people more honestly, more vigorously and more devotedly. Term limitation gives more people the opportunity to stand for and hold elective office, people who have lived under the laws of their predecessors and are sensitive to the times and needs of the people.

CONCLUSION

The power to limit the terms of their congressional representatives is a power reserved to the people under the Tenth Amendment. The only way that the people of the Nation can meaningfully exercise that power is through their states and through the political processes available to them. The real and perceived evils of incumbency are counter-productive to a representative democracy and the interests of the people far outweigh any imagined and unrealized benefit of long-term incumbency.

For all the foregoing reasons, Amici respectfully urge this Court to reverse the judgment of the Supreme Court of Arkansas.

DATED: August 16, 1994

Respectfully submitted,

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Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

U.S. TERM LIMITS, INC., et al.,
Petitioners

v.
RAY THORNTON, et al.,
Respondents

WINSTON BRYANT,
ATTORNEY GENERAL OF ARKANSAS,
Petitioner,

v.
BOBBIE E. HILL, et al.,
Respondents

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41 p/2

QUESTIONS PRESENTED

A. Is the method of limiting the terms of members of Congress from Arkansas that appear in this case not only constitutionally valid, but demonstrated by the adoption of the 17th and 19th Amendments to the Constitution?

1. 17th Amendment

2. 19th Amendment

B. Is such action by the states precluded, permitted, or even encouraged by the constitutional framework as designed in 1787?

(ii)

TABLE OF CONTENTS

QUESTIONS PRESENTED	(i)
TABLE OF CONTENTS	(ii)
TABLE OF AUTHORITIES	(iii)
BRIEF OF AMICI	1
INTEREST OF THE AMICI	1
OTHER MATTERS	3

ARGUMENT

A. Is the method of limiting the terms of members of Congress from Arkansas that appear in this case not only constitutionally valid but demonstrated by the adoption of the 17th and 19th Amendments to the Constitution?

1. The 17th Amendment	7
2. The 19th Amendment	17

(iia)

B. Is such action by the states precluded, permitted or even encouraged by the constitutional framework as designed in 1787?

CONCLUSION	26
------------	----

APPENDIX

TABLE OF AUTHORITIES

CASES

<u>BAKER v CARR</u> , 369 U.S. 186 (1962)	10
<u>GARCIA v SAN ANTONIO TRANSIT DISTRICT</u> , 469 U.S. 528 (1985)	22, 25
<u>HAWKE v SMITH</u> , 253 U.S. 221 (1920)	14
<u>KOREMATSU v U.S.</u> , 323 U.S. 214 (1944)	29
<u>POWELL v McCORMACK</u> , 395 U.S. 486 (1969)	18
<u>U.S. TERM LIMITS v THORNTON</u> , Doc. No. 93-1456, U.S.S.J.C.	7, 18

STATUTORY MATERIALS

U.S. Const., Art V ..10, 11, 13, 14, 17,	21, 22, 25
U.S. Const., Amend. I.....	26
U.S. Const., Amend. XVII	5, 6, 7, 8, 12, 13, 14, 16, 20, 26
U.S. Const., Amend. XVIII	14
U.S. Const., Amend. XIX.....	5, 6, 15, 17, 20, 26
Utah Term Limits Act of 1994	8
Wyoming Constitution	17

BOOKS & LAW REVIEW ARTICLES

George Bryan, <u>et.al.</u> , An Old Whig, Independent Gazeteer, October 12, 1787, reprinted in "The Debate On The Constitution", pp. 122, 123-4, (Bernard Bailey, ed., 1993)	4, 22
CATO Institute, Memorandum, July 21,1994, rev. August 11, 1994	6
<u>The Federalist</u> , No. 43, Hamilton...	21, 25
<u>The Federalist</u> , No. 68, Hamilton	28
<u>Report of the Special Committee on a Limited Convention Under Art. V., ABA (1973), pub. 1974</u>	11
<u>Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments,</u> Kris W. Kobach, 103 Yale L. J. 1971, No. 7, May, 1994. 5, 7, 10, 12, 14, 15, 17, 20	
A Statistical History of U.S. Presidential Elections, Sven Peterson	27

BRIEF OF AMICI

Amicus Curiae Congressional Term
Limits Coalition, Inc. (Maine)
(hereinafter referred to as "CTLC"),
Marylanders for Term Limits, Vermont Term
Limits, Connecticut Term Limits, New
Hampshire Citizens for Term Limits and New
Jersey Term Limits Coalition, Inc., file
this brief in support of Petitioners with
the consents of all parties, which have
been filed with the Clerk.

INTEREST OF AMICI

CTLC is a Maine non-profit
corporation formed in 1993 for the purpose
of unifying the citizen "grass roots"
effort to place a congressional term
limits initiative question on the ballot
for the November 1994 elections in Maine.
The proposed initiative prohibits an
incumbent Representative who has served 6
or more of the previous 11 years or
Senator who has served 12 or more of the
previous 17 years, from having his or her
name printed on the ballot, but does not
prevent such incumbent from being elected
as a write-in candidate on the ballot.

CTLC agrees with Petitioners, U.S. Term Limits, Inc., et al. and Winston Bryant, Attorney General of Arkansas, that such legislation does not constitute an additional qualification for service in Congress in violation of any Article of or Amendment to the U. S. Constitution. CTLC, as the source of the term limits initiative question on the ballot for the November 1994 elections in Maine, and the unified voice of over 54,513 citizens of the State of Maine who have petitioned to have this question on the ballot, has an interest in assuring that such legislation is valid and enforceable.

Marylanders for Term Limits, New Hampshire Citizens for Term Limits, Vermont Term Limits, Connecticut Term Limits and New Jersey Term Limits Coalition, Inc. join with CTLC, and agree with the Petitioners aforesaid, and, as representatives of citizens of their various states with respect to their efforts to have term limits legislation is valid and enforceable.

OTHER MATTERS

Amicus curiae CTLC, Inc., et al hereby adopts the Statement Jurisdiction, the Statement of the Case and the Standard of view set forth in the Brief of the Petitioner US TERM LIMITS (hereinafter U.S.T.L.) and pertinent portions of the Constitution of the United States as reported in U.S.T.L. Brief.

ARGUMENT

A. Is the method of limiting the terms of members of Congress from Arkansas that appear in this case not only constitutionally valid, but demonstrated by the adoption of the 17th and 19th Amendments to the Constitution?

In point of fact, George Bryan, a leading Pennsylvania Anti-Federalist, stated the problem plainly during the ratification debates on the Constitution, 1787:

We shall never find two thirds of a Congress voting or proposing any thing which shall derogate from their own authority and importance, or agreeing to give back to the people any part of those privileges which they have once parted with--so far from it: that the greater occasion there may be for reformation, the less likelihood will there be of accomplishing it. The greater the abuse of power, the more obstinately is it always persisted in. (emphasis added)

The quick answer to this question is yes. Both the 17th and 19th Amendments involved state-based alterations in the election of members of Congress, which eventually put enough pressure on a reluctant Congress that it proposed national amendments to accomplish what many states had already individually done. The supporters of term limits are embarked on the same course of action. And there is no question today of the legitimacy of the 17th Amendment, which made Senators popularly elected, nor of the 19th Amendment, which guaranteed women the right to vote.

The long answer to that question requires a factual and historical analysis of the processes which produced these two amendments, so it can be compared with the record of actions to date concerning term limits. A good beginning point for that analysis is "Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments, by Kris W. Kobach, 103 Yale L.J. 1971, No. 7, May, 1994.

This article contains only one significant factual error in the history

of the earlier amendments, however, that error leads to an incorrect legal conclusion on which the philosophical analysis rests. It involves the adoption of the 17th Amendment, and is corrected here. The error causes the author to refer to what term limits supporters are doing now as "a legally anomalous path," "Rethinking," at page 1972.

The author is correct in his principal conclusion that, "The strategy that term limits proponents are employing now is virtually identical to that which led to the adoption of the Seventeenth and Nineteenth Amendments." That is why the conclusion reached by this amicus brief on behalf of Six state organizations some of which have placed term limits on the 1994 ballot, is that the constitutionality of the term limits effort cannot be denied without also denying the constitutionality of these two, prior efforts that succeeded.

1. The 17th Amendment

The amici begin with the history of the 17th Amendment. With the one exception about to be described, this Amendment was achieved as described in "Rethinking," pps. 1976 - 1980. The parallels with term limits begin with the tactical situation. Then as now, the effort "faced seemingly insurmountable congressional hostility from the outset." (Rethinking," p. 1976.) Then as now, the decision was made to approach the proposed change state by state. Then as now, both the initiative and legislative routes for state action were pursued. In what has been termed, the "greatest grassroots movement of the 20th century " term limits is sweeping the country.

As the main brief for US Term Limits points out, the effort involves successful initiatives in 15 states prior to 1994, initiative efforts (all federal-four state Legislature-two local-one county) in seven new states in 1994, including Maine, plus modification of prior, successful petitions in Colorado and Nebraska. In addition to the initiatives, term limit

supporters had legislation introduced in 1993 in three states which do not have the initiative process. In New Jersey, New Hampshire and Texas the amendments to their election codes to provide for term limits for members of Congress passed one house, but not the other. These efforts will be renewed, because term limits cannot succeed any more than the 17th Amendment could have succeeded, without statutory action by some states.

Also, it is noted that Utah is the first state to pass legislation to limit Congressional terms. Utah Term Limits Act of 1994. Utah included a provision that its law would not take effect until 24 other states had also acted. Other states who take up the issue are expected to include the same provision, to avoid being in a Congressional minority when term limits take effect. Since there are only 23 states where the initiative process is available for this purpose, by definition term limits must obtain not just popular votes but legislative action in at least two states. (The 23rd state, not mentioned above, is Mississippi. Its new initiative law requires any proposal to go

before the legislature in a session before it can appear on the ballot. Petitioning has succeeded there, but the voters will not have the opportunity to vote on it until 1995.

In addition, it is believed that term limits will be on the ballot in the following cities:

Washington, DC (ballot drive completed)		
Baltimore	Knoxville	Topeka
Chattanooga	Nashville	Kansas City
		(Kansas)
Milwaukee	Madison	Lawrence
Green Bay	Akron	

At present 13 of the 25 largest cities in the country have some form of term limits on local officials. The six cities listed above fall within the largest 25 cities in population and if the voters pass term limits on November 8, there will be as many as 18 of the 25 larger cities with some form of term limits.

In addition, it is expected that the number of term limited jurisdictions in

the country will at least double by November 8, 1994. There are over a hundred jurisdictions in the country which currently have term limits and by November 8 it is expected over 100 others to pass term limits. Included in this category are Minneapolis and Spokane.

The author of "Rethinking" does note that supporters of direct election of Senators also pursued a strategy that is expressly provided for in Article V. "Starting in 1901, various states passed resolutions calling for a national convention to propose an amendment in accordance with the second proposing mechanism of Article V." ("Rethinking," p. 1977.) The factual error is in dismissing this as inconsequential in the next sentence, "However, like every effort before and since, the campaign for a national proposing convention was unsuccessful."

In the late 1960's, the Dirksen Amendment failed narrowly. That amendment would have partially reversed **Baker v. Carr**, [369 U.S. 186 (1962)] by allowing one house of a bicameral state legislature

to be apportioned on a basis other than population. Prompted by the uncertainties about the calling of a constitutional convention for a limited purpose, in 1972 the American Bar Association appointed a Special Committee, composed of eleven experienced individuals and chaired by the Dean of Harvard Law School. Its mission was to determine whether a limited convention was constitutional.

In 1973, the Committee issued its Report. And the ABA published the "Report of the Special Committee on a Limited Convention Under Article V," in 1974. The Committee unanimously concluded that a limited convention could be conducted if the states so demanded, and that Congress could pass enabling legislation to carry out such a limitation. This was also identified as official policy of the American Bar Association, since its House of Delegates approved the Report in 1974, as noted therein.

For present purposes, the Report shows information about the Article V convention calls that the author of "Rethinking" apparently did not have. In

Table A on pps. 83-84 the Report listed all of the convention calls ever made by the states, and identified the principal ones by their subject. A total of 3 states passed such calls for a convention limited to proposing an amendment to make US Senators directly elected by the people. At that time, the Union contained 46 states, so the target number to trigger the calling of a convention was 31 states.

This fact explains one aspect of the 17th Amendment that "Rethinking" does mention, the "eleven-month stalemate in the House-Senate conference committee, [before] the House accepted the Senate version of the amendment...." (At p. 1979.) It also explains one aspect the article does not mention, the presence of a classic grandfather clause as clause three of the Amendment. It states, "This Amendment shall not be construed so as to affect the term or election of any Senator serving at the time of its ratification." This grandfather clause is the reason for the eleven-month stalemate between the House and Senate. It also offers silent but

eloquent testimony to the effectiveness of the states' Article V convention calls on the amendment.

Had a convention written the amendment, it could have put all the non-elected Senators out in the street, and required the election of an entirely new Senate, with its members drawing lots to determine which ones would serve two-, four- or six year terms initially. The sitting members of the Senate were certainly aware that the first Senators in the First Congress were elected all at one time, and did draw lots to determine the length of their initial terms.

In short, the sitting Senators followed a well-known political axiom in their writing of their version of the 17th Amendment, which they insisted the House accept. When you are about to lose a political battle, salvage what you can in defeat.

On the surface, the 17th Amendment was placed in the Constitution by the same method as all the others. It was proposed by two-thirds of the House and Senate, it was ratified by three-fourths of the

states. But, the political reality of the 17th Amendment, which "Rethinking" missed, was different. This amendment was achieved by the successful use of limited convention calls under Article V. The calls did not "succeed" in producing a convention. But, they did succeed in producing an amendment. Given the fact that more than 10,000 proposed amendments have been introduced in Congress over the first 200 years of that body and only 27 have been adopted, that is enough success for any effort.

So, contrary to the conclusion of the author of "Rethinking," the 17th Amendment was accomplished by actions within Article V. None of these convention calls were obtained by the initiative process. They did not offend this Court's later decision in *Hawke v. Smith*, 253 U.S. 221 (1920) that a referendum on the Ohio legislature's decision to ratify the 18th Amendment (Prohibition) was improper, since Article V grants power on such issues only to the legislature itself.

The last parallel between the effort to obtain the 17th Amendment and the term limits effort is in restriction

of what candidates can be voted for as members of Congress. "Rethinking" describes the Oregon plan, which was quickly adopted by many other states. (At p. 1978.) Under it, the voters acted in a prior election to make their choices for US Senate. Then, candidates for the state legislature were required to sign one of two statements. The first pledged the state legislator to vote for the Senate candidate "who has received the highest number of votes...." The second said the state legislator would consider the people's vote, "nothing more than a recommendation, which I shall be at liberty to wholly disregard...." As "Rethinking" says, "Not surprisingly, few politicians were willing to risk signing Statement No. 2" Equally not surprisingly, the first legislature to function under this law had to pick two Senators, and in 20 minutes chose the two winners of the popular vote.

Obviously, there were other men (the 19th Amendment was yet to come) running for these two Senate seats in Oregon. All other candidates were, by operation of this law, barred from consideration by the

legislature, which at that time still had the sole power to make the selection. In practical effect, the Oregon plan was more restrictive than term limit proposals are today. The Oregon plan limited the selection to just one candidate for each seat. Term limits allow any registered citizen of a state, except one incumbent who has served the limit, to be a candidate and win if possible. (Some term limit proposals even allow the incumbent to run again, but as a write-in candidate.)

"Rethinking" concluded about the 17th Amendment that, "This dramatic reversal was the result of the state-by-state alternations of the structure of the federal government." (At p. 1979.) This conclusion is unjustified by the facts. Some states did change only what belonged to them, their representation in the Senate. And they did so through their election codes under the Time, Place and Manner Clause of the Constitution. The national, structural change did not occur, and could not have occurred, until the Constitution had been duly amended, as it was.

2. The Nineteenth Amendment

There are no factual errors in the description of the process leading to the 19th Amendment to guarantee the right to vote for women. *Amici* add just one detail that underscores the author's point that "an inherent structural interest made the proposal of [this] constitutional amendment virtually impossible...." (At p. 1980.) The territories of Utah and Wyoming allowed women full political rights. They could vote, and they could run as candidates. Wyoming repeatedly applied for admission and was repeatedly refused. Each time, Congress objected to its constitutional provision allowing women to vote. Each time, Wyoming refused to change it. Finally, in 1890, Congress relented and allowed Wyoming to join the Union with its constitution intact, including women's suffrage.

There was no hint of the use of the convention call mechanism of Article V in the effort to obtain the vote for women. The reason was apparently a tactical decision by the proponents that state legislatures would be hostile to their

efforts, unlike the states legislatures' attitudes toward direct election of Senators. So, the initiative route was followed throughout.

The debate over term limits both in numerous scholarly articles and among the public as initiative and legislative proposals are considered, has always included the claim by opponents that limits impermissibly "add another Qualification" to be elected to the Congress. All of the scholarly articles, and some of the lay press articles, mention the case of *Powell v. McCormack*, [395 U.S. 486 (1969)]. Since this case is amply analyzed in other briefs, it will not be further discussed here except to note that Adam Clayton Powell came to Washington with his certificate of election from the State of New York. There was no question he was duly elected, and no question of state election law was presented or decided in that case.

However, the *Powell* case is referenced because part of the split decision in *Thornton* relies solely upon it. When states acted to give women the

right to vote, they also necessarily changed the "Qualifications" for members of Congress. For a full century, from 1791 to 1890, there was an unwritten but inexorable qualification, candidates had to be male. The day that Wyoming joined the Union, that was no longer true. Since anyone registered to vote, old enough, and resident of the state long enough could run for Congress, on that day, women became "qualified" to run for Congress, but only in Wyoming.

In every other state, the males-only qualification remained in effect. Since half the adult population was women, this change in "qualifications" effected more of the populace than any other one ever considered. (Since the League of Women Voters was created by veterans of the long struggle to obtain the vote for women, state by state, it is ironic that the League appears in this Court and in this case, attacking the very process by which its Founders won their greatest victory.)

B. Is such action by the states precluded, permitted, or even encouraged by the constitutional framework as designed in 1787?

The answer to this question is, such actions are not only permitted, they are encouraged in the precise circumstances presented by the 17th Amendment, the 19th Amendment, and now by the yet to come Term Limits Amendment. What "Rethinking" says of the first two amendments applies equally to the third, "Both Amendments posed an inherent and direct threat to the reelection of sitting members of Congress; accordingly, there was little chance that Congress would exercise its proposing function unless compelled to do so." (At p. 1983.) This far, amici agree with the conclusion. But the author follows that statement with this, "Consequently, proponents of reform used the states to usurp this function."

This is simply untrue. At times, it seems like the author of "Rethinking" is concerned that politics enter into the Congressional decision-making on constitutional amendments. Witness, for instance, the tremendous pressures that

were brought to bear in many ways in order to establish Prohibition. Then, all those forces and pressures were reversed two decades, later, to end Prohibition. To paraphrase the French Captain in Ricks' Place in the movie, *Casablanca*, "I'm shocked, shocked, to find politics going on in this place."

Every decision by Congress on every subject that comes before it, is subject to political pressure from those interested in the outcome. This has always been true, it will always be true. It is part of the job description of being a member of Congress.

Sometimes the pressure will come specifically from the states, because many of them hold a different view on the particular subject than does Congress. Alexander Hamilton recognized this potential difference of opinion on the subject of amendment of the Constitution, In *The Federalist*, Number 43 he justified the dual nature of Article V by saying, "it allows for the correction of errors as they are perceived on the one side or the other." In context, he is referring to Congress and the state legislatures.

The history of the writing of Article V is covered fully in the main briefs, so amici here emphasize only one point. It is dual not by accident, nor by compromise between warring factions. It is dual because the Delegates realized that the views of Congress and the states might be different, and that both should have a role in proposing as well as ratifying.

That is exactly what Hamilton said and meant in justifying Article V. Elsewhere in *The Federalist* he noted the danger when the personal prerogatives of Congress itself are at issue. [One is reminded of George Bryan's 1787 remarks during the ratification debates quoted on page one of this brief.]

Nothing in the Constitution prohibits the states from bringing pressure to bear on Congress when they feel that body is acting improperly. In fact, a sharply divided decision of this Court assumes such action. In *Garcia v. San Antonio Transit District*, [469 U.S. 528 (1985)], this Court reversed prior decisions and concluded that the Tenth Amendment was not judicially enforceable. It was, instead,

up to the states to protect themselves politically against what Justice O'Connor called "Congress' underdeveloped sense of self-restraint." To deny the states this opportunity to put pressure on Congress on the subject of term limits is to take away from them even the political defense of their citizens when they feel Congress is acting wrongly.

"Rethinking" concludes, correctly, that the Framers were aware of the referendum device in state constitutions and deliberately chose not to employ it in the Constitution. (At p. 1988.) But it is equally true that if they were aware of the referendum device, they approved it in such states who chose to have it, since whatever powers states previously had that were incompatible with their vision of the Constitution, they forbade. The termination of the states' previously used powers to coin money and to tax interstate commerce are two clear examples.

The problem with the conclusion of "Rethinking" about "amendment by national referendum" (p. 1988) is the mixing of apples and oranges. Under the Framers' view, states were free to use popular

election devices if they chose (then only the referendum, now the initiative as well). Some states did so choose, some didn't. Today, the count is 23 yes, 27 no. But initiatives even in all 23 states on the same day, if that happened, is not the same as a national initiative. The term limit initiatives like the one in Arkansas affect only the election copes of that state and no other. A national initiative, should one ever be established, will be binding on all states, including those where the citizens may have voted against it within their own boundaries.

"Rethinking" throws amendment of state constitutions, which can sometimes be accomplished by initiative, into the same pot with amendment of the U.S. Constitution, which cannot. All of the article's philosophical arguments are ladled from that mismatched pot. Even if 49 states had the initiative, and even if all 49 magically agreed on a single form of term limits--which the record clearly demonstrates they would not--passage of the proposal in all 49 states would not amend the U.S. Constitution. The 50th

state would still be free to reelect its members of Congress for life until and unless the U.S. Constitution was amended under Article V.

What the states are doing is changing their own election laws, as they have a right to do under both their own constitutions and the U.S. Constitution. In the process, they are sending very clear and powerful messages to Congress about what Congress should do on term limits. This is politics, as "Rethinking" does acknowledge in saying Congress would have to be forced to act. This is politics as recognized by this Court in *Garcia, supra*. This is politics, as recognized by Alexander Hamilton in *The Federalist*.

Conclusion

Because of the very close parallels between the 17th and 19th Amendments and the term limits effort represented in the instant case, amici submit that this Court cannot deny the constitutional legitimacy of what they are doing without at the same time, denying the legitimacy of the direct election of Senators, or of voting rights for women. The situations are too similar to be distinguished, one from the other.

The amici in this brief are some of the organizations and their leaders who have done the long, hard, time-consuming, expensive work of organizing, campaigning, and going to the people for their decision, just as thousands of people did to obtain the 17th and 19th Amendments. They are exercising their First Amendment rights to "petition the government for redress of grievances." Other briefs have fully discussed the First Amendment, so it will not be further discussed here. Suffice to say, a fatal blow will be struck against this right not just on term limits but on any subject in the future

where Congress is part of the problem, if this door that has been used twice and is being used again, is closed.

This leads to the final point.

These amici do not know whether any other brief will mention the doctrine of laches, so they raise it here. Laches can apply even in the area of constitutional law. For instance, the Electoral College was set up to allow its members to exercise their independent judgement about who should be President and Vice President. For the first two elections of George Washington and John Adams, that is exactly what they did. (Contrary to popular myth, the election of Washington was not unanimous. See, Sven Petersen, *A Statistical History of US Presidential Elections*.) However, by the third election in 1799, the Federalist Party had formed, and developed the idea of pledged Electors. Though the voters voted only for the Electors, the Electors were announced in advance to vote for particular candidates.

In the 200 years since, the pledged Elector has been enshrined in state

election codes. An attempt to vote other than pledged is in most states an automatic resignation, and in some states a felony. The last "unfaithful elector" to date was Roger McBride in Virginia, who was pledged to Richard Nixon but voted for Ronald Reagan. The point is, there is no question the present system violates what the Framers intended for the Electoral College. As Alexander Hamilton wrote in **The Federalist**, Number [68],

"Talents for low intrigue and the little arts of popularity, may alone suffice to elevate a man first honors in a single state, [but it will require other talents, and to be chosen President of the United States--this appears in the **Federalist** where Hamilton is justifying the College.] a different kind of merit, to establish him in the esteem and confidence.

The point is not whether the change in the use of the College has allowed anyone with "talents for low intrigue and the little arts of popularity" to become President. The point is whether a case brought now could successfully challenge the change in the College. It could not. Even if this Court unanimously agreed that the Electoral College had been improperly abandoned, laches would apply. Two centuries is too long to wait to bring a challenge.

This Court has demonstrated its view of the outer limits of laches in **Korematsu v. US**. In the original case of the same name in 1944, [323 US 214 (1944)] this Court upheld the creation of Japanese-American "internment" camps during World War II, by Executive Order of President Roosevelt. Forty-five years later, Mr. Korematsu brought a case to have his conviction overturned and to recover damages. This Court ruled only on the damages claim, a lower court having struck out the conviction. And, this Court applied laches; 45 years was too long.

If the process that term limit supporters are using today is arguably unconstitutional, the challengers have waited too long to bring their cases. Both the direct election of Senators and the vote for women began in 1890; one with the creation of the first direct primary for Senate, the other with the admission of Wyoming into the Union with women voting. This process is no more or less constitutional than it was then. Individuals and organizations aggrieved then, like those aggrieved today, could have filed suit and obtained a contemporaneous ruling on the constitutionality of such state-by-state efforts. They did not. A century is too long to wait to bring a constitutional challenge. Laches should apply as the last reason, if the case reaches that point, to reverse the decision of the Supreme Court of Arkansas.

The amici here fully support the position of the Petitioners in this case, US Term Limits, Inc., et al. They submit that their actions, which are identical to term limits supporters in Arkansas in 1992 which gave rise to this case, are well

recognized, time-honored, and constitutional. They submit that this should be the result, regardless of the degree of or weight given to the "original intent" of the Framers of the Constitution. They urge this Court to so rule.

Respectfully submitted,

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I hereby certify that on this 16th day of August, three true and correct copies of the brief of Amicus Curiae Congressional Term Limits Coalition, Inc. (Maine) et al. were served on each counsel of record for Petitioner and Respondent by first class mail postage prepaid, to the following persons:

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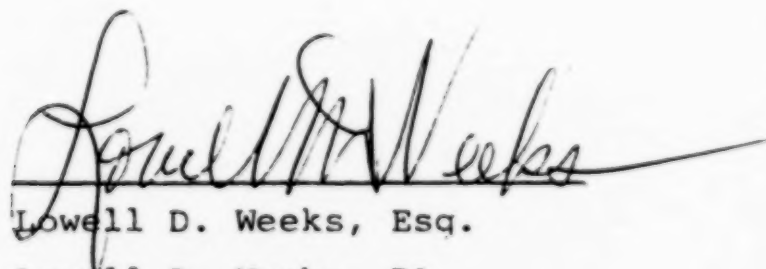
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U.S. TERM LIMITS, INC., ET AL., PETITIONERS

v.

RAY THORNTON, ET AL.

WINSTON BRYANT, ATTORNEY GENERAL OF ARKANSAS,
PETITIONER

v.

BOBBIE E. HILL, ET AL.

ON WRITS OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR THE UNITED STATES
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QUESTION PRESENTED

Whether Amendment 73 to the Arkansas Constitution, which provides that a person who has served three or more terms as a Member of the United States House of Representatives, or two or more terms as a Member of the United States Senate, can never again have his or her name placed on the ballot for that office, contravenes Article I, Section 2, Clause 2, and Article I, Section 3, Clause 3, of the United States Constitution.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	4
Argument:	
Amendment 73 adds to the qualifications for congressional service set forth in the Constitution and is therefore invalid	6
A. A term-limits provision would be unconstitutional if imposed by Congress	7
B. The Qualifications Clauses also restrict the power of the States	10
C. The Elections Clause does not authorize the States to impose additional qualifications like term limits	17
D. Amendment 73 is unconstitutional even though it leaves open the theoretical possibility of election by write-in vote	22
E. The Tenth Amendment does not sustain the validity of Amendment 73	26
Conclusion	27

TABLE OF AUTHORITIES

Cases:

<i>Adams v. Supreme Court</i> , 502 F. Supp. 1282 (M.D. Pa. 1980)	20
<i>Alex v. County of Los Angeles</i> , 111 Cal. Rptr. 285 (Ct. App. 1973)	20
<i>American Party of Texas v. White</i> , 415 U.S. 767 (1974)	22, 25
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	19, 22, 24
<i>Bullock v. Carter</i> , 405 U.S. 134 (1972)	26

IV

Cases—Continued:	Page
<i>Burdick v. Takushi</i> :	
776 P.2d 824 (Haw. 1989)	23
112 S. Ct. 2059 (1992)	23
<i>Chamberlin v. Wood</i> , 88 N.W. 109 (S.D. 1901)	23
<i>Gomillion v. Lightfoot</i> , 364 U.S. 339 (1960)	23
<i>Guinn v. United States</i> , 238 U.S. 347 (1915)	23
<i>Hawke v. Smith</i> , 253 U.S. 221 (1920)	27
<i>Hopfmann v. Connolly</i> , 746 F.2d 97 (1st Cir. 1984), vacated, 471 U.S. 459 (1985)	25
<i>Joyner v. Mofford</i> , 706 F.2d 1523 (9th Cir.), cert. denied, 464 U.S. 1002 (1983)	20
<i>Lane v. Wilson</i> , 307 U.S. 268 (1939)	23
<i>Lubin v. Panish</i> , 415 U.S. 709 (1974)	22, 24
<i>Lucas v. Forty-Fourth General Assembly of Colorado</i> , 377 U.S. 713 (1964)	16
<i>McCarthy v. Briscoe</i> , 429 U.S. 1317 (1976) (Powell, J., in chambers)	22, 24
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989)	16
<i>Oklahoma State Election Bd. v. Coats</i> , 610 P.2d 776 (Okla. 1980)	20
<i>Oregon v. Mitchell</i> , 400 U.S. 112 (1970)	21, 22
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969)	3, 4, 6, 7, 8, 9, 10
<i>Public Citizen, Inc. v. Miller</i> , 813 F. Supp. 821 (N.D. Ga.), aff'd mem., 992 F.2d 1548 (11th Cir. 1993)	25
<i>Roudebush v. Hartke</i> , 405 U.S. 15 (1972)	19
<i>Signorelli v. Evans</i> , 637 F.2d 853 (2d Cir. 1980)	20
<i>Smiley v. Holm</i> , 285 U.S. 355 (1932)	19, 21
<i>Smith v. Allwright</i> , 321 U.S. 649 (1944)	13
<i>State ex rel. Chandler v. Howell</i> , 175 P. 569 (Wash. 1918)	21
<i>State ex rel. Johnson v. Crane</i> , 197 P.2d 864 (Wyo. 1948)	21
<i>State ex rel. Watson v. Cobb</i> , 2 Kan. 32 (1863)	20
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	18, 19, 20
<i>Tashjian v. Republican Party of Connecticut</i> , 479 U.S. 208 (1986)	13, 24
<i>United States v. Classic</i> , 313 U.S. 299 (1941)	15, 22, 27

V

Cases—Continued:	Page
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968)	22
<i>Yarbrough, Ex parte</i> , 110 U.S. 651 (1884)	21
Constitutions and statutes:	
U.S. Const.:	
Art. I	3
§ 2, Cl. 2 (Qualifications Clause)	3, 4-5, 6, 22
§ 3, Cl. 3 (Qualifications Clause)	3, 6, 13, 22
§ 3, Cl. 7	7
§ 4, Cl. 1 (Elections Clause)	3, 5, 6, 17, 18, 19, 21, 22, 26
§ 6, Cl. 2	7
Art. IV	3
Amend. I	3
Amend. X	4, 5, 6, 26, 27
Amend. XIV	3, 7, 22
§ 3	7
Amend. XV	23
Amend. XVII	5, 13
Ark. Const. Amend. 73	passim
Hatch Act, 5 U.S.C. 7323(a) (3) (Supp. V 1993) ..	20
Nev. Rev. Stat. Ann. § 293.270(2) (Michie 1990) ..	23
Okla. Stat. Ann. tit. 26, § 7-127 (West Supp. 1994)	23
S.D. Codified Laws Ann. § 12-16-1 (Supp. 1994) ..	23
Miscellaneous:	
17 Annals of Cong. (1807):	
p. 871	16
p. 872	16
pp. 877-879	16
pp. 883-884	17
p. 886	16-17
p. 887	17
p. 894	16
pp. 900-901	17
pp. 907-909	17
pp. 912-913	17
pp. 918-920	17

Miscellaneous—Continued:

	Page
pp. 929-929	17
p. 1233	16
p. 1237	16, 17
139 Cong. Rec. S1146 (daily ed. Feb. 3, 1993)	17
<i>Debates on the Adoption of the Federal Constitution</i> (J. Elliot ed., reprint 1987) (1888):	
Vol. 2	14, 15
Vol. 4	18
Troy Andrew Eid & Jim Kolbe, <i>The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office</i> , 69 Denv. U. L. Rev. 1 (1992)	16
S. Rep. No. 1, 50th Cong., 1st Sess. (1887)	17
S. Rep. No. 1381, 88th Cong., 2d Sess. (1964)	17
<i>The Complete Anti-Federalist</i> (Herbert Storing ed. 1981):	
Vol. 2	14
Vol. 3	14
Vol. 4	14
Vol. 6	14
<i>The Federalist</i> (C. Rossiter ed. 1961):	
No. 15 (Hamilton)	10, 11
No. 52 (Madison)	11, 12
No. 53 (Madison)	15
No. 57 (Madison)	12
No. 59 (Hamilton)	11, 18
No. 60 (Hamilton)	10, 13, 21
<i>The Records of the Federal Convention of 1787</i> (Max Farrand ed., 1966 rev. ed.):	
Vol. 1	7, 8, 11
Vol. 2	8, 9, 10, 18
Gordon Wood, <i>The Creation of the American Republic, 1776-1787</i> (1969)	14

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1456

U.S. TERM LIMITS, INC., ET AL., PETITIONERS

v.

RAY THORNTON, ET AL.

No. 93-1828

WINSTON BRYANT, ATTORNEY GENERAL OF ARKANSAS,
PETITIONER

v.

BOBBIE E. HILL, ET AL.

ON WRITS OF CERTIORARI
TO THE SUPREME COURT OF ARKANSASBRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case involves the interpretation of federal constitutional provisions that address the composition of the national legislature. The provision under challenge, Amendment 73 to the Arkansas Constitution, attempts to impose term limits on the service of Members of the United States House of Representatives and United States Senate by prohibiting the names of long-term incumbent Members from appearing on the ballot. Amendment 73 is inconsistent with the structure of the federal system in that it effectively makes eligibility for membership in the Con-

gress dependent on regulation by a State. Amendment 73 also impairs the right of voters freely to choose their federal representatives. For these reasons, the United States has a substantial interest in this case.

STATEMENT

1. On November 3, 1992, the electorate of Arkansas approved an initiative adopting Amendment 73 to the Arkansas Constitution. Pet. App. 1a.¹ The Amendment's preamble provides as follows:

The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of the elected officials.

Id. at 3a-4a. To "limit the terms" of Arkansas' congressional delegation, Amendment 73 prohibits long-term incumbents from gaining a place on the election ballot. The Amendment specifically provides that any person who has been elected to three or more terms as a Member of the United States House of Representatives from Arkansas may not thereafter be "certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to" the House. *Id.* at 4a. It imposes an analogous restriction on candidates for the United States Senate who have been elected to two or more terms from Arkansas. *Id.* at 5a.

2. On November 13, 1992, respondent Bobbie E. Hill, on behalf of herself and the League of Women Voters of Arkansas, commenced this action for declaratory relief in the Circuit Court of Pulaski County, Arkansas. Pet.

¹ All references to "Pet. App." are to the Appendix to the Petition for a Writ of Certiorari in No. 93-1456.

App. 5a. The complaint alleged that Amendment 73 is invalid under Article I, Article IV, the First Amendment and the Fourteenth Amendment of the United States Constitution, because of the restrictions that it imposes on Arkansas' congressional delegation. *Id.* at 5a-6a.

On September 8, 1993, the circuit court entered a final order resolving the parties' cross-motions for summary judgment, Pet. App. 53a-62a, incorporating conclusions of law that the court had entered on July 29, 1993, *id.* at 45a-52a. The court held that Amendment 73 was adopted in violation of Arkansas law, and that the Amendment was also invalid under the Qualifications Clauses of the United States Constitution, Art. I, § 2, Cl. 2, and Art. I, § 3, Cl. 3. Pet. App. 46a-49a, 53a-60a.²

3. The Supreme Court of Arkansas, by a divided vote, affirmed in part and reversed in part. Pet. App. 1a-43a. The court unanimously reversed the circuit court's holding that Amendment 73 had not been adopted in accordance with state law. By a vote of 5-2, however, the court held that the provisions of Amendment 73 governing congressional incumbents violated the Qualifications Clauses.³

A plurality of three justices, relying on the historical background of the Qualifications Clauses and *Powell v. McCormack*, 395 U.S. 486 (1969), concluded that the age, citizenship, and residency requirements set forth in Article I are the exclusive qualifications for congressional service. Pet. App. 12a-13a. The plurality also determined that Amendment 73 could not be upheld as an exercise of the State's power under the Elections Clause, Art. I, § 4, Cl. 1, because "[t]he intent and the effect of Amendment 73 are to disqualify congressional incumbents

² The court rejected respondents' claims that Amendment 73 violated Article IV of the Constitution and the First and Fourteenth Amendments. Pet. App. 59a, 60a.

³ The court held that Amendment 73 was valid in all other respects.

from further service." Pet. App. 14a-15a. The plurality further concluded that the Amendment could not be upheld as an exercise of power reserved to the States by the Tenth Amendment because the Qualifications Clauses "fix the sole requirements for congressional service." *Id.* at 15a.

Justices Dudley and Brown concurred in the plurality's determination that Amendment 73 violates the Qualifications Clauses. Pet. App. 26a-27a, 41a-42a. Justices Hays and Cracraft dissented. *Id.* at 33a-35a, 37a-39a.

SUMMARY OF ARGUMENT

I. The Constitution specifies three qualifications for membership in the Congress—a minimum age, United States citizenship for a minimum number of years, and inhabitancy of the State of election. A review of the debates at the Constitutional Convention and the state ratifying conventions reveals that the Framers intended to preclude Congress from adding to this list of qualifications. See *Powell v. McCormack*, 395 U.S. 486, 532-541 (1969).

II. Petitioners' contention that the Framers denied Congress the power to add membership qualifications to those specified in the Constitution, but did not deny the same power to the States, is contrary to the Framers' design. The Framers believed that the fundamental defect of the Articles of Confederation was the failure to establish a direct and immediate relationship between the national government and the people. To ensure that the people would remain connected to the union and devoted to its success, the Framers provided for direct election of Representatives on a biennial basis. By fixing the qualifications for congressional service in the Constitution, the Framers prevented state legislatures from altering the popular character of the House by manipulating its membership. The term limits imposed by Amendment 73 would thus interfere with the people's right freely to elect their Representatives, secured by Article I, Section 2,

Clause 2, and their Senators, secured by the Seventeenth Amendment.

III. Petitioners contend that Amendment 73 may be upheld as a valid exercise of state power under the Elections Clause, Art. I, § 4, Cl. 1, which provides that the "Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." The primary purpose of the Elections Clause, however, was to restrict state power, because the Framers were concerned that the States might use election powers to subvert the national government. The Elections Clause authorizes States to impose general ground rules to preserve the integrity of the electoral process, but Amendment 73 is not such a rule. Its aim and effect are to prevent a specific class of individuals (long-term incumbents) from winning elections. Moreover, because the Elections Clause grants Congress a power coextensive with that of the States, petitioners' theory would effectively give Congress the power to impose qualifications on its Members, even though the Framers specifically deprived Congress of that power. Petitioners' argument that Amendment 73 is not a qualification because it theoretically permits the write-in election of persons excluded from the ballot is not persuasive, because the unquestioned intent and virtually certain effect of Amendment 73 are to prevent the reelection of the incumbents excluded from the ballot.

IV. The Tenth Amendment also provides no authority for States to impose congressional term limits. If the Qualifications Clauses established an exclusive list of requirements for congressional service and deprived the States of the power to add any other qualifications, then the Tenth Amendment cannot authorize the States to add to this list. Moreover, because the Congress did not exist prior to the ratification of the Constitution and the creation

of the federal government, the States can have no "reserved" power to regulate congressional elections.

ARGUMENT

AMENDMENT 73 ADDS TO THE QUALIFICATIONS FOR CONGRESSIONAL SERVICE SET FORTH IN THE CONSTITUTION AND IS THEREFORE INVALID

Neither the United States Congress, nor either of its Houses, can constitutionally impose term limits upon Senators or Representatives by restricting membership in either House to persons who have not already served a certain number of terms. In *Powell v. McCormack*, 395 U.S. 486, 522 (1969), the Court held that the Houses of Congress are "without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in [Article I, Section 2, Clause 2, or Article I, Section 3, Clause 3, of] the Constitution." (Emphasis omitted.) A term-limits provision that disqualified any person from being seated in either House because of prior service would impermissibly impose qualifications of service beyond those set forth in Article I, Section 2, Clause 2, and Article I, Section 3, Clause 3.

Petitioners contend, however, that a term-limits provision can nevertheless be constitutional if it is imposed by a State. Petitioners argue that Amendment 73 to the Arkansas Constitution is constitutional because (a) Article I, Section 2, Clause 2, and Article I, Section 3, Clause 3, restrict only Congress's power, and not that of the States; (b) the States have the power, under the Elections Clause, Art. I, § 4, Cl. 1, to restrict incumbents' access to the ballot; (c) Amendment 73 leaves open the theoretical possibility that an incumbent may be reelected by write-in vote, and therefore does not impose a "qualification" in addition to those established in the Constitution; or (d) the Tenth Amendment reserves to the States the power to limit the length of service in Congress. Each

of these arguments is incorrect, and Amendment 73 is unconstitutional.

A. A Term-Limits Provision Would Be Unconstitutional If Imposed By Congress

As this Court held in *Powell*, the Constitutional Convention established three qualifications for membership in the Congress—age, citizenship, and inhabitancy of the State of election—and denied to Congress the power to add any further qualifications.⁴ Among the additional qualifications considered and rejected by the Convention was a term-limits provision. The Virginia Plan, presented to the Convention on May 29, 1787, by Edmund Randolph, proposed several qualifications for membership in the "first branch" of a bicameral legislature, including an unspecified age qualification, the predecessor to the subsequently adopted clauses restricting service by Members of Congress in the Executive Branch (Art. I, § 6, Cl. 2), and a term-limits or rotation provision, which provided that the Members of the first branch would be "incapable of re-election" for an unspecified time after expiration of their term of service. 1 *The Records of the Federal Convention of 1787*, at 20 (Max Farrand ed., 1966 rev. ed.) [hereinafter Farrand]. The term-limits proposal was unanimously rejected by the Convention on June 12, before

⁴ The Constitution does contain other qualifications for service, such as the disqualification from federal office of persons convicted after impeachment (Art. I, § 3, Cl. 7), and the Incompatibility Clause, prohibiting simultaneous service in the federal Executive and Legislative Branches (Art. I, § 6, Cl. 2), as well as a disqualification added by the Fourteenth Amendment, prohibiting service by certain persons who had fought for the Confederacy (Amend. XIV, § 3). Since these disqualifications were carefully considered by the framers of the provisions and written into the Constitution, they do not suggest a general authority in either Congress or the States to impose additional qualifications. Indeed, they reinforce the point that the exclusive qualifications for office are found in the Constitution itself. See *Powell*, 395 U.S. at 520 n.41.

the plan of the Convention was submitted to the Committee of Detail. 1 *id.* at 217.

On the motion of George Mason, however, the Convention instructed the Committee of Detail to consider the propriety of additional qualifications for membership based on property ownership. 2 Farrand 121-125; *Powell*, 395 U.S. at 532-533. After considering that proposal, as well as another one to restrict membership in the Congress to those persons possessing the qualifications under state laws to be electors (such as sanity, previous residence in the State for a year, possession of real property, or enrollment in the state militia, 2 Farrand 139-140), the Committee reported a plan establishing age, citizenship, and residency qualifications for membership in both Houses, 2 *id.* at 178, 179, and authorizing the Congress to establish additional, uniform property qualifications for membership, 2 *id.* at 179. No other qualifications were reported out of the Committee.

The Convention debated the Qualifications Clauses on August 8, 9, and 10. On August 8, the Convention considered the Committee of Detail's proposal that every Member of the House and Senate must be "a resident of the State in which he shall be chosen." 2 Farrand 178, 179. Roger Sherman proposed that the word "resident" be replaced by the word "inhabitant," which was "less liable to misconstruction." 2 *id.* at 216. James Madison supported the change, pointing out that, in the Virginia legislature, there had been "[g]reat disputes" over the meaning of the word "resident." 2 *id.* at 217. Gouverneur Morris and John Francis Mercer, though opposing any residency requirement, made the same criticism of the term "resident." *Ibid.* Apparently, the defect of the word "resident," in the view of the Convention, was that it was a legal term, not self-defining but subject to construction by the States; Madison suggested, for example, that it might be construed to exclude "persons absent occasionally for a considerable time on public or private business." *Ibid.* Madison preferred a uniform requirement

of inhabitancy in the State at the time of election. The Convention apparently accepted this reasoning, for it unanimously replaced the term "resident" with "inhabitant." 2 *id.* at 218.⁵

The debates on August 10, which were extensively reviewed by the Court in *Powell*, led to the elimination of any additional qualifications for membership in Congress. "[O]n this critical day the Framers were facing and then rejecting the possibility that the legislature would have power to usurp the 'indisputable right [of the people] to return whom they thought proper' to the legislature." 395 U.S. at 535 (footnote omitted). The initial question before the Convention was whether to accept the Committee of Detail's proposal that the Congress be authorized to establish property qualifications for Members. Madison opposed any additional qualification for membership as contrary to republican government; he argued that granting the power to a legislature to regulate the qualifications of its own members could "subvert the Constitution" by undermining the people's right freely to elect their representatives. 2 Farrand 249-250. Gouverneur Morris countered by proposing "to leave the Legislature entirely at large" in enacting membership qualifications, not limited to property ownership, but Madison opposed that proposal even more strenuously, adverting to the British Parliament's abuses of the power to set its members'

⁵ The debates on August 8 are particularly relevant, for they suggest that the Convention was concerned with uniformity of qualifications, and not just the possibility that Congress might expand the list of qualifications (which was debated on August 10). The Convention's rejection of the word "resident" because the word could be variously defined by the States, in favor of the more self-defining word "inhabitant," supports the view that the Framers intended to forbid the States from adding qualifications, especially since the qualification of residency had been a contentious matter in the state legislatures. To contemporary ears, the word "inhabitant" may not sound much more self-defining than the word "resident," but the Convention plainly found a significant difference between the two terms.

qualifications. 2 *id.* at 250; see *Powell*, 395 U.S. at 535 & n.68.

The Convention rejected both Morris's proposed amendment, 2 Farrand 250, and the Committee's proposal for property qualifications, 2 *id.* at 251. The result, as the Court held in *Powell*, was that the qualifications for membership in the Congress were "defined and fixed in the Constitution, and [were made] unalterable by the legislature." 395 U.S. at 539 (quoting *The Federalist* No. 60, at 371 (Hamilton) (C. Rossiter ed. 1961)); see also 395 U.S. at 550 ("Therefore, we hold that, since Adam Clayton Powell, Jr., was duly elected by the voters of the 18th Congressional District of New York and was not ineligible to serve under any provision of the Constitution, *the House was without power* to exclude him from its membership.") (emphasis added).

B. The Qualifications Clauses Also Restrict The Power Of The States

There is no basis for petitioners' argument that the Constitution limited the power of Congress to add qualifications but did not similarly limit the power of the States. Such a power, if permitted to the States, would have fundamentally contravened the Framers' design by making service in the federal Congress dependent on regulation by the States. That power would have allowed the States to interfere with the direct and immediate relationship between the people and the union, on which the success of the federal government was thought to depend.

In the Framers' view, "the great and radical vice" of the Articles of Confederation was the "principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist." *The Federalist* No. 15, at 108 (Hamilton). The Framers therefore discarded the confederal structure of the Articles for a national government that "extend[ed] the authority of the Union to the persons of the citizens—

the only proper objects of government." *Id.* at 109. But the Framers perceived that the state governments might attempt to subvert the connection between the people and the union, and so the question became one of how to ensure that "[t]he people of America [remain] warmly attached to the government of the Union, at times when the particular rulers of particular States * * * may be in a very opposite temper." *The Federalist* No. 59, at 365-366 (Hamilton).

To the Framers, the solution lay in the republican nature of the union, and, in particular, the popular character of the House of Representatives. As Madison observed, "the popular election of one branch of the national Legislature [was] essential to every plan of free Government," because, without direct elections, "the people would be lost sight of altogether; and the necessary sympathy between them and their rulers and officers, too little felt." 1 Farrand 49-50. The union could be "stable and durable" only if the legislature "should rest on the solid foundation of the people themselves," rather than an intervening electoral body, like the state legislatures. 1 *id.* at 50. Elections to the House would keep the people devoted to the success of the union, because its doors would be open "to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth." *The Federalist* No. 52, at 326 (Madison). Thus, the Framers required biennial elections to the House to ensure that the federal Congress would retain "an immediate dependence on, and an intimate sympathy with, the people." *Id.* at 327. They also prohibited the state legislatures from unduly burdening the right of suffrage in elections to the House, which might undermine the popular quality of the House that was crucial to the effectiveness of the federal government. See *id.* at 326 (permitting state legislatures to regulate suffrage for federal House "would have rendered too dependent on the State governments that branch of

the federal government which ought to be dependent on the people alone").

The debates on residency illustrate the Framers' distrust of state regulation of qualifications. As discussed *supra*, pp. 8-9, the Convention adopted a provision requiring that every Representative and Senator be an "inhabitant" of the State of election, and rejected the term "resident" as subject to state manipulation. Recognizing a state power to impose term limits would be inconsistent, not only with the Framers' general intent to preclude state interference with the right of the people to choose their federal representatives, but also with the Framers' specific resolution of the residency issue.⁶

In explaining the Convention's actions, Madison argued that the Convention had ensured the popular character of the House by guaranteeing to the people the right to elect anyone of their choosing to that chamber:

Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.

The Federalist No. 57, at 351. Elaborating on this point, Hamilton refuted the argument that the House would become a tool of the "wealthy and the well-born" by

⁶ Although the Convention did not discuss state regulation of qualifications for federal office beyond residency, there is no doubt that the Framers were aware of the possibility that the States would try to regulate the qualifications for membership in the federal Congress. Madison noted this possibility when he observed that the Convention had fixed the qualifications for service in the Constitution, rendering such service immune from regulation by either Congress or the States: "The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention." The Federalist No. 52, at 326.

pointing out that there was "no method of securing to the rich the preference apprehended but by prescribing qualifications of property either for those who may elect or be elected." The Federalist No. 60, at 370-371 (emphasis added). According to Hamilton, the Convention had made this abuse impossible, because "[t]he qualifications of the persons who may choose or be chosen * * * are defined and fixed in the Constitution, and are unalterable by the legislature." *Id.* at 371.⁷ To the Framers, therefore, the fact that qualifications for service in the Congress were fixed by the Constitution ensured that the intended character of the Congress (especially the democratic character of the House) would be preserved.⁸

The Framers' decision to preclude term limits became a significant point of contention in the ratification debates.

⁷ Not only did this prohibition of further restrictive qualifications keep the House open to democratic impulses, but, in the Framers' view, it also safeguarded against the possibility that factions, supposedly more likely to be prevalent in state legislatures than in Congress, could capture the process of election to the House and use it to their advantage. See The Federalist No. 60, at 367-368 (Hamilton).

⁸ There is less discussion in *The Federalist Papers* about qualifications for Senators. Because Senators were to be elected by the state legislatures, the danger that those legislatures could interfere with the people's choice of representatives did not apply to the Senate. With the adoption of the Seventeenth Amendment, however, the Framers' concerns about guaranteeing the people's right to elect their chosen representatives did become applicable to the Senate. Cf. *Smith v. Allwright*, 321 U.S. 649, 659-660 (1944); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 227 (1986) ("fundamental principle of free electoral choice" was enshrined in Seventeenth Amendment). Moreover, the Framers did fix the qualifications for senatorial service in the Constitution, see Art. I, § 3, Cl. 3, and in doing so, they may have perceived a danger that a state legislature might otherwise try to restrict its successors' choice of Senators. As noted in the text, during the ratification debates, the Federalists opposed compulsory rotation of office for Senators on the grounds that it would deny to state legislatures the opportunity to reelect experienced and qualified Senators and would destabilize the Senate.

Anti-Federalists focused on the absence of compulsory rotation of office for Members of Congress as threatening to States and people alike, arguing that Members would remain permanently in office, detached from sentiment in the state legislatures and among the people in their home States.⁹ Any understanding that the States would be able to impose a rotation requirement on either Representatives or Senators was absent from the ratification debate. In the New York ratifying convention, for example, where rotation of office was debated at length, both Melancton Smith and Gilbert Livingston identified rotation of Senators as a chief advantage of the Articles of Confederation over the new Constitution,¹⁰ yet neither Robert Livingston nor Alexander Hamilton, the Constitution's principal defenders at that convention, even hinted that New York would retain the power, under the Constitution, to impose rotation on its representatives.

In fact, the Framers believed that compulsory rotation of office could undermine the effectiveness of the federal government, because (like excessively frequent elections, which they also opposed) compulsory rotation would prevent the federal representatives from developing expertise in the complex task of governing the nation. Madison remarked that "[a] few of the members, as happens in all such assemblies, will possess superior talents; will, by frequent re-elections, become members of long standing; will be thoroughly masters of the public business, and

⁹ See Gordon Wood, *The Creation of the American Republic, 1776-1787*, at 521-522 (1969); 2 *The Complete Anti-Federalist* 283, 290-292, 444-445 (Herbert Storing ed. 1981) [hereinafter *Complete Anti-Federalist*] ("The Federal Farmer" and "Brutus" objecting to lack of rotation); 3 *id.* at 94 ("Letter by An Officer of the Late Continental Army"; same); 3 *id.* at 162-163 (published dissent of the minority at Pennsylvania ratifying convention; same); 4 *id.* at 275 ("Observations by a Columbian Patriot"; same).

¹⁰ See 6 *Complete Anti-Federalist* 164-165; 2 *Debates on the Adoption of the Federal Constitution* 287 (J. Elliot ed., reprint 1987) (1888) [hereinafter *Elliot's Debates*].

perhaps not unwilling to avail themselves of those advantages. The greater the proportion of new members and the less the information of the bulk of the members, the more apt will they be to fall into the snares that may be laid for them." The Federalist No. 53, at 335. Hamilton, at the New York convention, urged that compulsory rotation of office actually made representatives less accountable to the people, because the prospect of reelection kept them attuned to the will of the people, whereas "[w]hen a man knows he must quit his station, let his merit be what it may, he will turn his attention chiefly to his own emolument." 2 *Elliot's Debates* 320.

The principle to be drawn from the Convention and ratification debates, therefore, is that "[t]he right of the people to choose [their Members of Congress] * * * is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right." *United States v. Classic*, 313 U.S. 299, 314 (1941). Amendment 73 is unconstitutional because it impairs the right of the voters of Arkansas to elect candidates of their choice.

Because Amendment 73 was enacted by initiative rather than the Arkansas legislature, it may not appear to pose precisely the same threat to the relationship between the people and the union that the Framers feared. Petitioners do not contend, however, that Amendment 73 is constitutional merely because it was adopted by initiative rather than legislation. Moreover, the abridgment of the people's free choice of elected representatives, and the consequent threat to the connection between the people and the national government, are both present in this case. For example, the majority of voters in one (or more) Arkansas congressional districts may, in the future, wish to reelect their Representatives, but Amendment 73 would effectively prevent them from doing so. Amendment 73 would thus abridge the constitutional right of those Arkansas voters to choose their Members of Congress without regard to

any qualifications for federal office beyond those in the Qualifications Clauses. "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 736-737 (1964).¹¹

¹¹ Petitioner U.S. Term Limits suggests that the States imposed additional qualifications on Members of Congress at a very early stage. See Br. 25-27. As respondent Hill points out, this suggestion is a misleadingly incomplete description of the States' practices in the period immediately after the adoption of the Convention. But even if that assertion were correct as a factual matter, it would not be probative. Given that a key concern of the Framers was that the state legislatures would attempt to interfere with free elections to the federal Congress, actions by those very state legislatures are not reliable indicators of the Framers' intent. Indeed, the States' actions cited by petitioner U.S. Term Limits show that the Framers' fears were justified.

Moreover, decisions made by the federal House and Senate support the view that States may not add to the required qualifications of Members of Congress. Cf. *Mistretta v. United States*, 488 U.S. 361, 398-401 (1989). One of the earliest controversies concerning the qualifications of Members-elect occurred in 1807, when the House of Representatives voted to seat William McCreery of Maryland, despite his alleged failure to satisfy certain residency requirements imposed by state law. 17 Annals of Cong. 1233, 1237 (1807). The House Committee on Elections issued a report stating that the Constitution did not "reserv[e] any authority to the State Legislatures to change, add to, or diminish" the qualifications set forth in the Constitution. *Id.* at 871. During the floor debates, the Chairman of the Committee, Rep. William Findley of Pennsylvania, similarly expressed the view that "neither the State nor the Federal Legislatures are vested with authority to add to" the qualifications set forth in the Constitution. *Id.* at 872. (Rep. Findley had been an Anti-Federalist, and had issued the "Letter by An Officer of the Late Continental Army," referred to in note 9, *supra*, criticizing the Constitution for its failure to include a rotation provision. See Troy Andrew Eid & Jim Kolbe, *The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office*, 69 Denv. U. L. Rev. 1, 14 n.72, 33 (1992).) See also 17 Annals of Cong. 894 (1807) (Rep. Rowan) ("No power had been given to the State sovereignties to superadd qualifications."); *id.* at 877-879 (Rep. Sturges); *id.* at 886 (Rep.

C. The Elections Clause Does Not Authorize The States To Impose Additional Qualifications Like Term Limits

Petitioners contend that Amendment 73 may be upheld as a valid exercise of state power under the Elections Clause, Art. I, § 4, Cl. 1, which provides that the "Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." According to petitioners, Amendment 73 is merely a regulation of the "Manner" of holding elections for Congress. This argument is incorrect for several reasons.

First, the argument misperceives the fundamental purpose of the Elections Clause, which was designed primarily as a restriction of state power, not a grant of it. The Convention adopted the Elections Clause out of

Joseph Clay); *id.* at 887 (Rep. Smilie); *id.* at 907-909 (Rep. Quincy); *id.* at 912-913 (Rep. Key); *id.* at 918-920 (Rep. Howard); *id.* at 928-929 (Rep. Desha). But see *id.* at 883-884 (Rep. Randolph); *id.* at 900-901 (Rep. Love); *id.* at 1237 (Rep. Barker).

In 1887, the Senate seated Charles Faulkner of West Virginia, despite a provision in the West Virginia Constitution that purported to render him ineligible to serve. See 139 Cong. Rec. S1146 (daily ed. Feb. 3, 1993) (statement of Sen. Mitchell). The Senate Committee on Privileges and Elections unanimously concluded that "no State can prescribe any qualification to the office of United States Senator in addition to those declared in the Constitution of the United States." S. Rep. No. 1, 50th Cong., 1st Sess. 4 (1887).

In 1964, the Senate seated Pierre Salinger, who had been appointed by the Governor of California to fill a vacancy upon the death of Senator Clair Engle, despite the fact that Salinger had not satisfied the requirement of a state statute that Senators be qualified as electors in California elections. See 139 Cong. Rec. S1146 (daily ed. Feb. 3, 1993) (statement of Sen. Mitchell). In its report recommending that Salinger be seated, the Senate Committee on Rules and Administration stated that "[i]t is well settled that the qualifications established by the U.S. Constitution for the office of U.S. Senator are exclusive, and a State cannot, by constitutional or statutory provisions, add to or enlarge upon those qualifications." S. Rep. No. 1381, 88th Cong., 2d Sess. 5 (1964).

concern that the States might attempt to undermine the federal government by impeding elections to the Congress; the Elections Clause ensured that Congress could preserve itself whenever such a threat appeared. The Convention did grant the States authority to regulate election procedures "in the first instance" (The Federalist No. 59, at 363 (Hamilton)), since state regulation of procedural matters "in ordinary cases, and when no improper views prevail," might be more convenient than federal regulation (*ibid.*). But the purpose of the clause was to deprive the state legislatures of the "exclusive power of regulating elections for the national government, * * * [which] would leave the existence of the Union entirely at their mercy." *Ibid.*

Second, there is no evidence that the Framers intended the Elections Clause to cover anything more than election *procedures*, such as "[w]hether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place, [or] sh[ould] all vote for all the representatives; or all in a district vote for a number allotted to the district." 2 Farrand 240 (Madison). Absent from the Convention or ratification debates is any suggestion that the Elections Clause empowered the state legislatures to exclude *classes* of persons from the ballot, or otherwise to restrict their ability to be elected. See 4 *Elliot's Debates* 71 (statement of Mr. Steele at North Carolina ratifying convention) ("[T]he power over the manner only enables them to determine *how* these electors shall elect—whether by ballot, or by vote, or by any other way."). Such an authority to exclude classes of persons would have given the States the power to impose "qualifications," a power that the Convention intended to deny them.

This Court has upheld the authority of the States, under the Elections Clause, to regulate election procedures, and to ensure an orderly and comprehensible ballot. The States have power to "maintain[] the integrity of the political process," *Storer v. Brown*, 415 U.S. 724, 731

(1974), and to ensure that "some sort of order, rather than chaos, is to accompany the democratic processes," *id.* at 730. Thus, even in federal elections, States may require that independent candidates "be clear of political party affiliations for a year before the primary," *id.* at 733, to assure the voters that independent candidates are legitimately independent. States also have broad authority under the Elections Clause to ensure the "protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 366 (1932); see also *Roudebush v. Hartke*, 405 U.S. 15, 25 (1972) (States may provide recount procedures in federal elections "to guard against irregularity and error in the tabulation of votes"); *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983) (States may impose "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself").

None of these decisions suggests, however, that the States may use their authority under the Elections Clause for the purpose of preventing the election of a class of persons, defined without reference to their support in the electoral process. Petitioners attempt to draw support from cases such as *Storer v. Brown*, *supra*, for that assertion, but the States' authority to channel the process by which any candidate can gain access to the ballot cannot be equated to a power to exclude a class of candidates from the ballot entirely. Completely incapacitating a group of persons, defined by their prior experience rather than their ability to attract voter support, from gaining access to the ballot is not an "evenhanded" regulation of "the electoral process itself."

The Court in *Storer* made exactly that point. While upholding California's power to use party primaries "to

winnow out and finally reject all but the chosen candidates," 415 U.S. at 735, thus preventing "sore losers" in the party primary from reappearing on the general election ballot as independent candidates, the Court emphasized that the party primary "involve[d] no discrimination" against true independents (*id.* at 733), who could gain access to the ballot by the circulation of ballot petitions. In rejecting a Qualifications Clause challenge to the "sore loser" law, the Court noted that California required only that "the candidate win the primary to secure a place on the general ballot or otherwise demonstrate substantial community support." *Id.* at 746 n.16. In other words, no candidate was prevented from entering the race to gain a spot on the general election ballot. That ballot was, instead, open to all candidates who demonstrated, by one or another method, that they had sufficient support to survive the "winnowing out" process.¹²

¹² Some state "resign to run" statutes have withstood scrutiny under the Qualifications Clauses, but only where the State regulates the conduct of state officials while they choose to remain in state office. See *Joyner v. Mofford*, 706 F.2d 1523, 1528-1531 (9th Cir.), cert. denied, 464 U.S. 1002 (1983); *Signorelli v. Evans*, 637 F.2d 853, 858-863 (2d Cir. 1980); *Adams v. Supreme Court*, 502 F. Supp. 1282, 1291 (M.D. Pa. 1980); *Oklahoma State Election Bd. v. Coats*, 610 P.2d 776, 778-780 (Okla. 1980); *Alex v. County of Los Angeles*, 111 Cal. Rptr. 285, 293-294 (Ct. App. 1973); see also *State ex rel. Watson v. Cobb*, 2 Kan. 32, 58 (1863) (State "cannot interfere with the tenure of [federal] office," although it can declare state offices vacant when incumbent has been elected to federal office). The principle of these decisions is that the States have a legitimate interest in ensuring that their officeholders pay full attention to their state positions, and not simultaneously hold (or run for) other positions. Resign-to-run laws are intended as a qualification for service in the state office, not the federal Congress, and the would-be candidate can always avoid the bar by resigning the state position. Similarly, the Hatch Act, 5 U.S.C. 7323(a)(3) (Supp. V 1993), which prohibits federal employees from running as candidates or nominees for partisan political office (including the House and Senate), constitutes a regulation of the federal civil service, not the federal Congress,

Petitioners also overlook the fact that, if the Elections Clause gives the States the power to impose term limits, then it must give Congress the same power, since, under that clause, Congress "may at any time by Law make or alter" similar regulations. Art. I, § 4, Cl. 1. See *Smiley v. Holm*, 285 U.S. at 367; *Ex parte Yarbrough*, 110 U.S. 651 (1884). But the Framers clearly *denied* to Congress the power to establish additional qualifications (including term limits) for Representatives and Senators. In refuting the argument that the Congress might abuse its power under the Elections Clause to establish arbitrary qualifications for office, Hamilton thus relied squarely on the fact that the limited powers conferred by the Elections Clause did not include a power to set qualifications:

Its authority would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.

The Federalist No. 60, at 371.¹³ By giving to Congress, through the back door of the Elections Clause, a power

in that it requires civil servants to place the interest of their federal employment ahead of their political ambitions, for as long as they retain their civil service positions.

On the other hand, the courts have struck down provisions that disqualify state officials from running for federal office during the entire term to which they were appointed or elected, even if the state officeholder resigns to run. See *State ex rel. Johnson v. Crane*, 197 P.2d 864 (Wyo. 1948); *State ex rel. Chandler v. Howell*, 175 P. 569 (Wash. 1918). Because, in those cases, the candidate is disqualified for the entire term of state service, even if he or she resigns, such a bar exceeds the State's interest in regulating its own officeholders.

¹³ There may be some question whether this remark by Hamilton was entirely accurate, in that the Convention may not have denied to Congress the power to alter the qualifications of *electors* in federal elections, only the qualifications of those who might be elected. See *Oregon v. Mitchell*, 400 U.S. 112, 122-123 (1970)

that the Convention denied to it through the Qualifications Clauses, petitioners' argument contravenes the Framers' design.

D. Amendment 73 Is Unconstitutional Even Though It Leaves Open The Theoretical Possibility Of Election By Write-in Vote

Petitioners contend that Amendment 73 is not a qualification because those excluded from the printed ballot are not absolutely prohibited, as a matter of law, from being elected; they retain the theoretical possibility of being elected by write-in vote. This argument ignores reality. The Court has recognized that exclusion from the ballot is, in all practical effect, exclusion from election. See *Anderson v. Celebrezze*, 460 U.S. at 799 n.26; *Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974); *United States v. Classic*, 313 U.S. at 313; see also *McCarthy v. Briscoe*, 429 U.S. 1317, 1323 (1976) (Powell, J., in chambers); cf. *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) ("The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes."). "The Constitution requires that access to the electorate be real, not 'merely theoretical.'" *American Party of Texas v. White*, 415 U.S. 767, 783 (1974) (cita-

(opinion of Black, J.) (suggesting Elections Clause gave Congress power to set voters' qualifications); cf. *id.* at 142-143 (opinion of Douglas, J.) (arguing that Fourteenth Amendment gave Congress power to regulate suffrage in federal elections); *id.* at 231 (opinion of Brennan, White, and Marshall, JJ.) (same). But even if Hamilton did misstate the Convention's position on the specific point of *electors'* qualifications, that does not cast doubt on this Court's holding in *Powell* that the Framers specifically deprived Congress of the power to add qualifications for service by *Members* beyond those established by Article I, Section 2, Clause 2, and Article I, Section 3, Clause 3. No analogous constitutional provision denies Congress the power to regulate the suffrage in federal elections. Petitioners' construction of the Elections Clause would eviscerate the holding of *Powell* by allowing Congress to enact legislation, pursuant to the Elections Clause, to exercise a power specifically denied it by the Framers.

tion omitted). As far as we are aware, only one Senator and four Representatives have been elected by write-in vote in this century. See J.A. 201-202.

Although petitioners recognize the near-impossibility of election by write-in vote, they argue that Amendment 73 does not impose an unconstitutional "qualification" because, in a few scattered instances, Amendment 73 may not have its intended effect of preventing the election of one who has previously served a certain number of terms.¹⁴ Petitioners do not contest, however, that both the intended purpose and the virtually certain effect of Amendment 73 are to prevent the election of candidates who have served their "limit." While the technical terms of Amendment 73 were evidently designed to circumvent the restrictions on state power imposed by the Qualifications Clauses, the conclusion is "irresistible, tantamount for all practical purposes to a mathematical demonstration" (*Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960)), that it will have the same effect as an outright disqualification in almost every instance. Cf. *Lane v. Wilson*, 307 U.S. 268, 275 (1939) (Fifteenth Amendment bars "onerous procedural requirements which effectively handicap exercise of the franchise * * * although the abstract right to vote may remain unrestricted"); *Guinn v. United States*, 238 U.S. 347, 365 (1915) (in case involving "grandfather clause" exemption from literacy test for suffrage, "we seek in vain for any ground which would sustain any other interpretation but that the provision[] recurr[ed] to the conditions existing before the Fifteenth Amendment was adopted").

¹⁴ Moreover, although Arkansas permits write-in voting, at least four States do not. See *Burdick v. Takushi*, 776 P.2d 824, 825 (Haw. 1989) (interpreting Hawaii election laws to prohibit write-in voting); *Chamberlin v. Wood*, 88 N.W. 109, 110-112 (S.D. 1901) (holding that write-in votes could not be counted under South Dakota's Australian ballot law (S.D. Codified Laws Ann. § 12-16-1 (Supp. 1994))); Nev. Rev. Stat. Ann. § 293.270(2) (Michie 1990); Okla. Stat. Ann. tit. 26, § 7-127 (West Supp. 1994). States are not constitutionally required to provide an opportunity for write-in voting. *Burdick v. Takushi*, 112 S. Ct. 2059 (1992).

To be sure, incumbents seeking reelection or those who have previously served in Congress are more likely to be known to voters than are other candidates. The disabilities imposed by write-in voting, however, are not limited to name recognition. Through a place on the ballot, a candidate demonstrates that he or she has "the requisite community support," *McCarthy v. Briscoe*, 429 U.S. at 1323 (Powell, J., in chambers), and is therefore a serious candidate for the office. Cf. *Lubin v. Panish*, 415 U.S. at 715 (noting legitimate state interest in "ballots * * * limited to serious candidates with some prospects of public support"). Ballot status may also demonstrate to the voters that the candidate has received the endorsement of, or at least substantial support from, the machinery of a political party, which can then be expected to cooperate with the candidate after the election to effectuate his or her program.¹⁵ In addition, without a spot on the ballot, "[v]olunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign." *Anderson v. Celebrezze*, 460 U.S. at 792. Candidates forced to seek election through write-in votes are denied credibility in the voters' eyes, and by relegating a class of candidates to write-in status, Arkansas signals to its voters that a vote for those candidates is a throw-away vote.¹⁶ In any case, the avowed purpose of Amendment

¹⁵ Indeed, Amendment 73 may impair the rights of political parties to advance the reelection of their incumbent officeholders. Cf. *Tashjian*, 479 U.S. at 221-222. If a party wished to support the reelection of an incumbent excluded from the ballot by Amendment 73, that provision would force the party to choose between (a) nominating no one for the general election ballot and relying on write-in votes, thus forfeiting its ballot position for that general election and perhaps also endangering its ballot position for elections in the future, and (b) nominating someone to hold a place on the ballot, but running the risk of splitting votes between the nominee on the ballot and the incumbent, the party's real choice.

¹⁶ Two lower court decisions suggest that the ability to run a write-in campaign can be sufficient to turn what would otherwise

73 is to "limit the terms" of Arkansas Members of Congress, and that purpose, coupled with the likely effect in almost every election contest to which it would apply, is sufficient to establish its unconstitutionality.

Even if Amendment 73 could somehow be viewed as a procedural ballot-access provision rather than a qualification, it would nevertheless be unconstitutional because it is not rationally related to any legitimate state interest. The stated purpose of the Amendment is to prevent the election of candidates who, it is feared, will have the greatest support among the electorate. This is not "even[ing] out the playing field," as petitioner Bryant contends (Br. 26), but, rather, attempting to prevent a group of persons from playing at all.

To argue that Amendment 73 does not establish a qualification for office, petitioners are forced to concede that incumbents may be legitimately *elected*, notwithstanding Amendment 73, yet they wish to prevent that fact from being disclosed to the voters of Arkansas on the printed ballot. In this respect, the present case resembles the absentee ballot practice struck down in *American Party of Texas v. White*, 415 U.S. at 794-795. There, the Court held that Texas could not deny a position on the absentee ballot to candidates of parties that had qualified to appear on the general election ballot. Since there was no legitimate reason to deny absentee voters the opportunity to vote for candidates who had qualified for the ballot, the absentee ballot practice was struck down as "an arbitrary discrimination violative of the Equal Protection Clause." *Id.* at 795.

be an impermissible "qualification" into a permissible "ballot-access restriction." *Hopfmann v. Connolly*, 746 F.2d 97, 102-103 (1st Cir. 1984); vacated on other grounds, 471 U.S. 459 (1985) (per curiam); *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821, 831-833 (N.D. Ga.), aff'd mem., 992 F.2d 1548 (11th Cir. 1993). Both cases, however, involved procedural election regulations, and the discussion of write-in voting was unnecessary to the decisions.

In the present case, petitioners concede that incumbent officeholders may be qualified to be reelected, yet the purpose of Amendment 73 is to keep that information from the voters. If so, the Amendment is aimed, not at preventing "the clogging of [the ballot to] avoid voter confusion," *Bullock v. Carter*, 405 U.S. 134, 145 (1972), but at creating voter confusion by misleading voters as to the identity of legitimate candidates. Nor could Amendment 73 be upheld as an effort to "assume that the winner is the choice of a majority, or at least a strong plurality, of those voting," *ibid.*, since the likely and intended effect of the Amendment would be to prevent the election of candidates with substantial support. There is no basis for holding that fostering voter confusion about the identity of legitimate candidates or preventing the election of popular ones is a permissible state objective.

E. The Tenth Amendment Does Not Sustain The Validity Of Amendment 73

Finally, petitioners contend that Amendment 73 is a legitimate exercise of power traditionally exercised by the States, and reserved to the States by the Tenth Amendment. The Tenth Amendment, however, provides that "powers not * * * prohibited by [the Constitution] to the States, are reserved to the States." (Emphasis added.) Because the Qualifications Clauses prohibit both Congress and the States from adding qualifications to service in Congress, the Tenth Amendment has no application here.

In addition, it is doubtful that state power over federal elections was considered by the Framers to be among the sovereign powers "reserved" to the States by the plan of the Convention and the Tenth Amendment. The federal Congress did not exist before the Constitution, and the authority of the States to regulate federal elections to the Congress stems from the power delegated to the States by the Constitution itself, in the Elections Clause, and not from their previous existence as otherwise sovereign

entities. Cf. *Hawke v. Smith*, 253 U.S. 221, 230 (1920) (state authority to ratify constitutional amendments "has its source in the Federal Constitution" and not the general reserved powers of the States). As this Court has noted, "[w]hile, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I." *United States v. Classic*, 313 U.S. at 315 (citations omitted). The Tenth Amendment therefore could not "reserve" to the States the power to regulate elections to the new federal legislature.

CONCLUSION

The judgment of the Supreme Court of Arkansas should be affirmed.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

U.S. TERM LIMITS, ET AL.,
Petitioners

v.

RAY THORNTON, ET AL.,
Respondents

STATE OF ARKANSAS EX REL. WINSTON BRYANT,
ATTORNEY GENERAL OF THE STATE OF ARKANSAS,
Petitioner

v.

BOBBIE E. HILL, ET AL.,
Respondents

On Writ of Certiorari to the
Supreme Court of Arkansas

BRIEF FOR HENRY J. HYDE AS
AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Amicus will address the following question:

Whether it is consistent with the intent of the Framers for a state to add to those qualifications for service in Congress that are expressly prescribed in the Constitution.

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES	iii
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	3
A. Pre-Constitutional History	4
B. The Constitutional Convention and Ratification	8
C. Post-Ratification History	19
CONCLUSION	25

TABLE OF AUTHORITIES

	<i>Pages</i>
Cases	
<i>Opinion of the Justices to the Senate,</i> 595 N.E.2d 292 (Mass. 1992)	7
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969) . .	4-6, 8, 19
Constitutions	
Art. Confed. Art. V, § 2 (1778)	7
U.S. Const. Article I, § 2, cl. 1	14
Miscellaneous	
1 Annals of Cong. (1789)	13
17 Annals of Cong. (1807)	20-24
<i>Anti-Federalists Versus</i> <i>Federalists: Selected Documents</i> (J. Lewis ed. 1967)	9
<i>The Complete Anti-Federalist</i> (H. Storing ed. 1981)	9, 10
<i>The Debates in the Several State</i> <i>Conventions on the Adoption of the</i> <i>Federal Constitution</i> (J. Elliot 2d ed. 1836)	12, 13
E. Douglas, <i>Rebels and Democrats</i> (1955)	8
Eid and Kolbe, <i>The New Anti-Federalism:</i> <i>The Constitutionality of State-Imposed</i> <i>Limits on Congressional Terms of</i> <i>Office</i> , 69 U. Denv. L. Rev. 1 (1992)	4, 20, 22, 24

TABLE OF AUTHORITIES - continued

	<i>Pages</i>
<i>The Federalist</i> (Bantam ed. 1988)	13-19, 22
L. Gipson, <i>The British Empire Before the American Revolution</i> (1956)	4, 6
Note, <i>Congressional Term Limits: Unconstitutional by Initiative</i> , 67 Wash. L. Rev. 414 (1992)	7
Note, <i>Constitutionality of Term Limitations: Can States Limit the Terms of Members of Congress?</i> , 23 Pac. L.J. 1677 (1992)	8
Otteson, <i>A Constitutional Analysis of Congressional Term Limits: Improving Representative Legislation Under the Constitution</i> , 41 Depaul L. Rev. 1, (1991)	7
16 Parl. Hist. Eng. (1769)	5, 6
H. Postgate, <i>That Devil Wilkes</i> (1929)	4, 6
1 <i>The Records of the Federal Convention of 1787</i> (M. Farrand ed. 1966)	8
F. Thorpe, <i>The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America</i> (1909)	7
C. Warren, <i>The Making of the Constitution</i> (1929)	5

TABLE OF AUTHORITIES - continued

	<i>Pages</i>
G. Wood, <i>The Creation of the American Republic, 1776-1787</i> (1969)	7-10
<i>Works of John Adams</i> (Charles F. Adams ed. 1851) . .	11

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**BRIEF FOR HENRY J. HYDE AS
AMICUS CURIAE SUPPORTING RESPONDENTS**

INTEREST OF THE AMICUS CURIAE

Amicus Henry J. Hyde represents the Sixth Congressional District of Illinois in the United States House of Representatives. He has served in the House since 1975, is chair of the House Republican Policy Committee, and is the Ranking Minority Member of the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee.

Representative Hyde believes that the United States Constitution sets forth the exclusive qualifications for service

in Congress and that the states may neither add to the list of qualifications nor adopt measures that have the practical effect of precluding the election of particular classes of constitutionally qualified candidates. He has an interest in assuring that the intent of the Framers of the Constitution is carried out and that the choice of candidates for Congress available to the voters of each congressional district is not unconstitutionally limited. He also has a compelling interest, as a Member of the House of Representatives, in preserving the effectiveness of Representatives and Senators by precluding the imposition of arbitrary limits on their tenure.¹

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' arguments are premised on a fundamental misconception of constitutional history. They maintain that the Constitution does not specifically preclude the states from adding to those qualifications for service in Congress that are stated in the constitutional text. In fact, however, the Framers had firmly in mind — and constructed the Constitution upon — two principles of democratic theory that are wholly incompatible with the state power contended for by petitioners.

First, the Framers believed that the right of the electorate to select the candidates of its choice was a fundamental aspect of liberty. That point was settled as a matter of English constitutional law by the notorious Wilkes case in the years immediately preceding the Constitutional Convention. And the principal Framers, including Madison, Hamilton, John Adams, and Robert Livingston, stated repeatedly and emphatically that the qualifications for service in Congress should be kept to a minimum and should be unalterably stated in the Constitution. Indeed, they regarded restrictions on the

¹ The parties' letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3 of the Rules of this Court.

electorate's ability to choose representatives as, in Adams' words, "a violation of the rights of mankind." Term limits — or any other restrictions on eligibility for service in Congress — imposed by the states plainly are incompatible with this principle.

Second, the Framers understood the essential guarantee of democracy to be, not limits on congressional tenure imposed by the states, but frequent elections. The prospect of having to face the electorate, it was believed, would keep members of Congress loyal to their constituents. On this view, the imposition of term limits by the states, which would remove the incentive for what Madison called "a faithful discharge of their trust" from members of Congress, would be positively inimical to the theory on which representatives were to be kept responsive to the people.

In this light, it is hardly surprising that all participants in the ratification debate understood the Constitution to state the *exclusive* qualifications for service in Congress. In particular, anti-federalist opponents of ratification understood term limits to be *wholly* excluded by the constitutional plan; federalist supporters of ratification declared it a great *virtue* of the Constitution that it guaranteed the people the right to vote for whomever they chose. Madison made that point clear in *The Federalist*, where he declared that service in Congress was open to all, while Hamilton agreed that the qualifications for service were "defined and fixed in the constitution." And this understanding was confirmed in the first generation after ratification, when the House disregarded a state's attempt to add to the constitutional qualifications for service in that chamber. The history therefore is decisive: the states cannot impose extra-constitutional requirements for service in Congress.

ARGUMENT

Petitioners devote remarkably little attention to what should be the dispositive consideration in this case: the intent

of the Constitution's Framers regarding the authority of the states to add to the qualifications for service in Congress that are set out in the Constitution. In fact, that intent was plain. The pre-constitutional history, the debates at the Convention and over ratification, the explicitly stated views of the principal Framers, and other indicia of the contemporary understanding make clear that the Constitution accepted as fundamental the premise that the people have the right to elect the senators and representatives of their choice. Against this background, the Framers would have been shocked at the suggestion that the states are free to determine who is eligible to serve in the national Congress. Arkansas' term limits provision cannot be squared with this understanding.

A. Pre-Constitutional History

1. The scene was set for the Convention's consideration of Article I, § 2, by the case of John Wilkes, which this Court has described as "the most notorious English election dispute of the 18th century" (*Powell v. McCormack*, 395 U.S. 486, 527 (1969)) — and one that petitioners wholly ignore. In 1763 Wilkes, then serving in the House of Commons, published a scathing criticism of the Crown for concluding a peace treaty with France, contending that it was the product of bribery. See H. Postgate, *That Devil Wilkes* 53 (1929). Wilkes was promptly arrested and, prior to trial, was expelled from the House. He subsequently fled (ironically) to France. See 9 L. Gipson, *The British Empire Before the American Revolution* 37 (1956); Eid & Kolbe, *The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office*, 69 U. Denv. L. Rev. 1, 28 (1992).

Wilkes returned to England in 1768, the year in which the Parliament from which he had been expelled was dissolved, and was elected to the next Parliament. Before he could begin service, however, he was convicted of seditious libel and sentenced to 22 months' imprisonment. See *Powell*,

395 U.S. at 527-528. When Wilkes was proposed ineligible for membership in the House, it was argued in his behalf:

*That the right of electors to be represented by men of their own choice, was so essential to the preservation of all their other rights, that it ought to be considered as one of the most sacred parts of our constitution. * * * That the law of the land had regulated the qualifications of members to serve in parliament, and that the freeholders * * * had an indisputable right to return whom they thought proper, provided he was not disqualified by any of those known laws. * * * [Those laws] are not occasional but fixed: to rule and govern the question as it shall arise; not to start up on a sudden, and shift from side to side, as the caprice of the day and the fluctuation of the party shall direct.*

16 Parl. Hist. Eng. 589-590 (1769) (emphasis added), quoted in *Powell*, 395 U.S. at 543 n.65.

Wilkes nevertheless was declared ineligible and was expelled from the House. 16 Parl. Hist. Eng. 545 (1769). He subsequently was re-elected three times to fill the vacant seat, but was pronounced ineligible to serve on each occasion. See *Powell*, 395 U.S. at 528. He was elected yet again in 1774 and began a lengthy campaign to have the resolutions declaring him ineligible to serve expunged from the record; he finally succeeded in 1782, when the House of Commons resolved that its prior treatment of Wilkes was "subversive of the whole body of electors of this kingdom." 22 Parl. Hist. Eng. 1411 (1782), quoted in *Powell*, 395 U.S. at 528.

The Wilkes episode was widely followed in the American colonies and was, it appears, cited by Madison at the Constitutional Convention. See C. Warren, *The Making of the Constitution* 420 n.1 (1929); *Powell*, 395 U.S. at 535-536 n.68. The Court has noted that

Wilkes' struggle and his ultimate victory had a significant impact in the American colonies. His advocacy of libertarian causes and his pursuit of the right to be seated in Parliament became a *cause celebre* for the colonists. "[T]he cry of 'Wilkes and Liberty' echoed loudly over the Atlantic Ocean as wide publicity was given to every step of Wilkes' public career in the colonial press. . . . The reaction in America took on significant proportions. Colonials tended to identify their cause with that of Wilkes. They saw him as a popular hero and a martyr to the struggle for liberty. . . . They named towns, counties, and even children in his honour."

Id. at 530-531, quoting 11 Gipson, *supra*, at 222. See also *id.* at 531 n.60; Postgate, *supra*, at 171-174.

As the Court has explained, "[i]t is within this historical context that [it] must examine the Convention debates in 1787, just five years after Wilkes' final victory." *Powell*, 395 U.S. at 531. And the principle to be derived from the Wilkes episode is clear. Wilkes' victory makes plain, of course, that the legislature should not have a free hand in setting the qualifications of its own members. See *id.* at 528-529. But more broadly, the Wilkes affair established "the right of the British electorate to be represented by men of their own choice." *Id.* at 528. It thus "is evident that, on the eve of the Constitutional Convention, English precedent stood for the proposition that 'the law of the land had regulated the qualifications of members to serve in Parliament' and that those qualifications were 'not occasional but fixed.'" *Ibid.*, quoting 16 Parl. Hist. Eng. 589, 590 (1769). In this setting, the Framers plainly came to the Constitutional Convention with the view that limits on the qualifications of those who would serve in Congress should be permanently set by the Nation's fundamental law — and that the people should not be deprived of the "essential" and "sacred" right to choose the representatives of their choice.

2. At the same time, the 1780s saw increasing dissatisfaction with the use of term limits as a safeguard of liberty. Many states had adopted term limits — particularly for the executive — as part of the Radical Whig reforms of the 1770s. Thus, seven of the ten new state constitutions drafted in 1776-1777 limited the number of years the chief magistrate could successively hold office. See G. Wood, *The Creation of the American Republic, 1776-1787*, at 140 (1969).² Only two states, however, limited the service of legislators; Pennsylvania, the center of radical reform during the period, limited the tenure of all state officials (see *id.* at 140 n.26; F. Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 3084 (1909)), while Virginia imposed term limits on its state senators. See Otteson, *A Constitutional Analysis of Congressional Term Limits: Improving Representative Legislation Under the Constitution*, 41 Depaul L. Rev. 1, 8 n.38 (1991). In addition, the Articles of Confederation limited the terms of delegates to the Confederation Congress to "no more than three years, in any term of six years" (Art. Confed. Art. V, § 2 (1778)), and four states (Maryland, New Hampshire, Pennsylvania, and Vermont) imposed additional limits on the terms of their delegates to the Confederation Congress. See Note, *Congressional Term Limits: Unconstitutional by Initiative*, 67 Wash. L. Rev. 414, 417 (1992).

During the 1780s, however, the perceived inadequacies of the state and Confederation governments prompted growing dissatisfaction with term limits. See Wood, *supra*, at 399, 436. Massachusetts thus considered but rejected a term limits provision in its 1780 constitution. See *ibid.* See also *Opinion of the Justices to the Senate*, 595 N.E.2d 292, 298-

² The seven were Delaware, Georgia, Maryland, North Carolina, Pennsylvania, South Carolina, and Virginia.

301 (Mass. 1992); E. Douglas, *Rebels and Democrats* 187-214 (1955). Pennsylvania's Council of Censors, acting in the home of radical Whiggism, proposed repeal of the Commonwealth's term limits in 1784 because "the privilege of people in elections, is so far infringed as they are thereby deprived of the right of choosing those persons whom they would prefer." Wood, *supra*, at 439 (citation omitted). And it appears that the term limits in the Articles of Confederation led to the loss of almost the entire Rhode Island delegation to the Confederation Congress in 1784, an episode that may have led many of the Framers to doubt the wisdom of limiting legislative terms. See Note, *Constitutionality of Term Limitations: Can States Limit the Terms of Members of Congress?*, 23 Pac. L.J. 1677, 1679-1680 (1992).

B. The Constitutional Convention and Ratification

1. Against this background, it is no surprise that the Convention voted *unanimously* to remove the congressional term limits that had been a part of the Virginia Plan. 1 *The Records of the Federal Convention of 1787*, at 217 (M. Farrand ed. 1966) (hereinafter "*Farrand*"). The Convention debates are addressed in detail by respondents and in *Powell* (395 U.S. at 532-536), and will not be repeated here. But one point bears emphasis. Responding to the proposal that Congress be given the authority to add qualifications to those specified in the Constitution, Madison declared that such an approach would vest "an improper & dangerous power in the Legislature" both for functional reasons and because of the essential principle that "[t]he qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution." *Farrand* at 249-250. That argument, which bears a "striking" similarity to "those made in Wilkes' behalf" (*Powell*, 395 U.S. at 534), plainly does not admit the possibility that the constitutionally specified qualifications may be "unfixed" by the states.

2. That the Constitution was understood to preclude states from adding to the qualifications specified in the text is made clear beyond peradventure by the ratification debates. Petitioner USTL finds it notable that opponents of the Constitution did not in terms suggest that states were denied the power to set the qualifications for service. Br. 42. In fact, however, anti-federalist opponents of the Constitution argued repeatedly and vehemently that "[r]otation in office, a 'truly republican institution,' had been abandoned [by the Constitution], making the Senate, some feared, 'a fixed and unchangeable body of men' and the president 'a king for life, like a king of Poland.'" Wood, *supra*, at 521 (citations omitted). The issue was debated repeatedly and at length, and the terms of the debate were clear: opponents of the Constitution believed that term limits — whatever their source — were wholly excluded by the constitutional plan; the Constitution's supporters replied that fundamental democratic principles properly precluded any attempt to bar voters from selecting the representatives of their choice.

Thus William Findley, a leading opponent of the Constitution, urged rejection of the document — in a tract that was widely reprinted in newspapers and was republished both as a broadside and as a short pamphlet (3 *The Complete Anti-Federalist* 91 (H. Storing ed. 1981)) — because (among other things) "ROTATION, that noble prerogative of liberty, is *entirely excluded from the new system of government* and the great men may and probably will be continued in office during their lives." *Letter of an Officer of the Late Continental Army*, Nov. 6, 1787 (*emphasis added*), in *id.*, § 3.8.3, at 94. See also S. Bryan, *Letters of Centinel*, Oct. 5, 1787, in *Anti-Federalists Versus Federalists: Selected Documents* 139-141 (J. Lewis ed. 1967) (same). Elbridge Gerry, a prominent anti-federalist who had attended the Convention, argued that absent term limits in the Constitution itself, inevitably there would be "the perpetuity of office in

the same hands for life." E. Gerry, *Replies to the Strictures of 'A Landlord' (1787)*, in *id.* at 199.

Many others offered similar objections. The essays of Brutus, "among the most important Anti-Federalist writings" which "were widely reprinted and referred to" (2 *Complete Anti-Federalist* 358), complained that "[i]t is probable that senators once chosen for a state will, as the system now stands, continue in office for life." *Id.*, § 2.9.201, at 244. Opponents of the Constitution in Pennsylvania, decrying the absence of term limits, declared that "[t]he permanency of the appointments of senators and representatives, and the control the congress have over their election, will place them independent of the sentiments and resentment of the people." *The Address and Reasons of the Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, Dec. 18, 1787, in 3 *Complete Anti-Federalist*, § 3.11.48, at 163. These dissenters added that, so far as preventing abuse of power by Congress was concerned, "there is no controul left in the state governments, whose intervention is destroyed." *Id.*, § 3.11.48 (emphasis added). Other critics, like the Federal Farmer — whose writings were "one of the ablest Anti-Federalist pieces" and were "widely known and respected" (2 *Complete Anti-Federalist* 214, 216) — maintained that the omission of term limits from the Constitution would lead Congress "to become in some measure a fixed body, and often inattentive to the public good, callous, selfish, and the fountain of corruption." *Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention: And to Several Essential and Necessary Alterations in It. In a Number of Letters from the Federal Farmer to the Republican*, 1787, in *id.*, § 2.18.147, at 290-291.

These arguments, of course, would have been nonsensical if the transformation of Congress into an "aristocratic tyranny" (Wood, *supra*, at 520 (citation omitted)) could have been avoided by the simple expedient of state-imposed term

limits. And it is telling that none of the defenders of the Constitution responded that states *could* require rotation in office or add other qualifications to the Constitution's list. To the contrary, they insisted that it was a great *virtue* of the Constitution that it guaranteed the people the right to vote for whomever they chose.

John Adams, for example, argued expressly that term limits were properly prohibited by the Constitution, grounding his view squarely on the democratic theory that the electorate had a fundamental, natural law right to select the representatives of their choice. He explained:

rotation * * * is a violation of the rights of mankind; it is an abridgement of the rights both of electors and candidates. There is no right clearer, and few of more importance, than that the people should be at liberty to choose the ablest and best men, and that men of the greatest merit should exercise the most important employments[.]

6 *Works of John Adams* 52-53 (Charles F. Adams ed. 1851). This argument, which again echoed the defense of Wilkes before Parliament, plainly understood the qualifications stated in the Constitution to be the fundamental law of the land that could not be modified in any respect, without constitutional amendment.

Others made identical arguments. Speaking to the New York ratification convention, Robert Livingston placed his defense of the Constitution's preclusion of term limits on grounds of both democratic theory and utility:

The people are the best judges [of] who ought to represent them. To dictate and control them, to tell them who they shall not elect, is to abridge their natural rights. This rotation is an absurd species of ostracism — a mode of proscribing eminent merit, and banishing from stations of trust those who have

filled them with the greatest faithfulness. Besides, it takes away the strongest stimulus to public virtue — the hope of honors and rewards. The acquisition of abilities is hardly worth the trouble, unless one is to enjoy the satisfaction of employing them for the good of one's country. We all know that experience is indispensably necessary to good government. Shall we, then, drive experience into obscurity? *I repeat that this is an absolute abridgement of the people's rights.*

2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 292-293 (J. Elliot 2d ed. 1836) (hereinafter "*Elliot's Debates*").

Hamilton made a similar practical argument to the New York convention:

[I]n contending for a rotation, the gentlemen carry their zeal beyond all reasonable bounds. I am convinced that no government, founded on this feeble principle, can operate well[.] * * * The gentlemen deceive themselves; the amendment would defeat their own design. When a man knows he must quit his station, let his merit be what it may, he will turn his attention chiefly to his own emolument: nay, he will feel temptations, which few other situations furnish, to perpetuate his power by unconstitutional usurpations. Men will pursue their interests. It is as easy to change human nature as to oppose the strong current of the selfish passions.

2 *Elliot's Debates* 320.³ Again, this argument that the

³ Hamilton and Livingston were responding to a proposal that the text of the Constitution be changed to impose term limits for senators; similar proposals as to all members of Congress were made by the North Carolina and Virginia ratifying conventions.

federal government would be rendered "feeble" by term limits plainly was understood to preclude restrictions imposed by the states — and, indeed, to preclude *especially* limits imposed by the states, which might be jealous of the national government's authority. This was a point to which Hamilton returned in *The Federalist*.

3. Indeed, any doubt that the qualifications stated in the Constitution were regarded as immutable is dispelled by *The Federalist*. At the outset, as respondents observe, Madison wrote unequivocally of the House of Representatives:

The qualifications of the elected being less carefully and properly defined by the State Constitutions [than those of the electors], and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the Convention. * * * Under these reasonable limitations, the door of this part of the Federal Government, is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.

The Federalist No. 52, at 266-267 (Bantam ed. 1988).

Madison returned to the point when he refuted the assertion that the House would become an "oligarchy" (*The Federalist* No. 57, at 289), explaining:

See 1 *Elliot's Debates* 330 (New York); 4 *Elliot's Debates* 243 (North Carolina); 3 *Elliot's Debates* 657-658 (Virginia). It is notable that neither the proponents nor the opponents of these amendments so much as suggested that states could accomplish the same result as to their own representatives and senators through action of the state legislature. As respondents note, the First Congress rejected a constitutional amendment that would have limited the terms of representatives. 1 *Annals of Cong.* 790 (1789).

Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession, is permitted to fetter the judgment or disappoint the inclination of the people.

Id. at 290. Hamilton agreed, writing that "[t]he qualifications of the persons who may choose or be chosen, as has been remarked upon [on] another occasion, are defined and fixed in the constitution; and are unalterable by the legislature." *The Federalist* No. 60, at 308. These propositions, premised on the theory that anyone would be permitted to serve in the House so long as he (only male representation was envisioned, of course) met the constitutionally prescribed qualifications, cannot be squared with the exclusion of a class of candidates by the states.

Petitioner USTL (at Br. 43-44) maintains that Hamilton in this latter statement (and Madison in his similar declaration to the Convention) "could not have been denying state power" because "in each instance when Madison and Hamilton referred to qualifications being 'fixed' by the Constitution, they referred in the very same sentence to the qualifications of *voters* (electors) as well as members of Congress"; Article I, § 2, cl. 1, USTL continues, "left the qualifications of *voters* entirely up to the legislature of each State." But this contention is wrong, because Hamilton and Madison plainly *did* regard the qualifications of electors as "fixed" even so far as the states are concerned. In making his statement, Hamilton observed that the unalterable nature of the qualifications of both the electors and the elected "has been remarked upon [on] another occasion." He had in mind *The Federalist* No. 52, where Madison expressly referred to "the qualifications of the electors and the elected." *The Federalist* No. 52, at 266.

Regarding the voters, Madison explained (*ibid.* (emphasis added)):

Those [qualifications] of [those eligible to vote for Congress] are to be the same [as] those of the electors of the most numerous branch of the State Legislatures. The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. *It was incumbent on the Convention therefore to define and establish this right in the Constitution.* To have left it open to the occasional regulation of the Congress, would have been improper for the reason just mentioned. *To have submitted it to the legislative discretion of the States, would have been improper for the same reason;* and for the additional reason that it would have rendered too dependent on the State Governments, that branch of the Federal Government, which ought to be dependent on the people alone.

Madison and Hamilton therefore plainly had it in mind that *both* the qualifications for suffrage *and* for service in Congress were matters of fundamental importance that should be "fixed" by the law of the land, and that should not be subject to variation by "the legislative discretion of the States."⁴

⁴ To be sure, the qualifications of voters, while fixed in the sense that they were tied to the qualifications for electors for the "most numerous branch" of the state legislature, need not be nationally uniform. Even as to this point, Madison observed that "because, being fixed by the State Constitutions, [the qualifications of voters are] not alterable by the State Governments, and it cannot be feared that the people of the States will alter this part of their Constitutions, in such a manner as to abridge the rights secured to them by the federal Government." *The Federalist* No. 52, at 266. In any event, the

In fact, the Framers would have regarded as remarkable the suggestion that the States could determine eligibility for service in the national Congress, in particular the House of Representatives. While the anti-federalists were concerned that Congress might attempt to aggrandize power to itself, the federalists feared that the states might seek to undermine the federal government. It was for this reason that the Time, Place, and Manner Clause gives Congress the power to set aside the rules governing elections that are prescribed by the states.

As Hamilton explained in *The Federalist* No. 59, at 300:

Nothing can be more evident, than that an exclusive power of regulating elections for the National Government, in the hands of the State Legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs. It is to little purpose to say that a neglect or omission of this kind, would not be likely to take place. The constitutional possibility of the thing, without an equivalent for the risk, is an unanswerable objection.

Hamilton added that

with so effectual a weapon in their hands as the exclusive power for regulating elections for the National Government a combination of a few [ambitious] men, in a few of the most considerable states, where the temptation will always be the strongest, might accomplish the destruction of the Union, by seizing the opportunity of some casual

important point for present purposes is that Hamilton's statement about the "fixed" qualifications of members of Congress was meant to declare a universal principle.

dissatisfaction among the people (and which perhaps they may themselves have excited) to discontinue the choice of members for the federal House of Representatives.

Id. at 303.⁵ Permitting the states to determine the qualifications for service in Congress, of course, would raise precisely the same danger.⁶

4. It may be added that the Framers regarded the essential guarantee of democracy to be, not the authority of the states to determine who would serve in Congress, but "[f]requent elections." *The Federalist* No. 52, at 267. These Madison described as the "corner stone" of free government. *The Federalist* No. 53, at 271. Madison therefore explained in *The Federalist* No. 57, at 290-291 (emphasis added), that the various other practical considerations that should lead representatives to be loyal to their constituents

⁵ Hamilton recognized that some of the same dangers were raised by giving the state legislatures the authority to select senators. But he described this "as an evil, which could not have been avoided without excluding the States, in their political capacities, wholly from a place in the organization of the National Government." *The Federalist* No. 59, at 301. He added that "however wise it may have been, to have submitted in this instance to an inconvenience, for the attainment of a necessary advantage, or a greater good, no inference can be drawn from thence to favor an accumulation of the evil, where no necessity urges, nor any greater good invites." *Id.* at 302.

⁶ Petitioner USTL's attempt (Br. 42) to find support in *The Federalist* for the proposition that the states were not to be deprived of the power to regulate all aspects of federal elections is insubstantial. In *The Federalist* Nos. 44 and 59, cited by USTL, Madison plainly, and Hamilton expressly, were speaking only of the Time, Place, and Manner Clause, which explicitly confers a limited power on the states (itself displaceable by Congress) to regulate the procedural aspects of elections.

would be found very insufficient without the restraint of frequent elections. Hence, * * * the House of Representatives is so constituted as to support in the members an habitual recollection of their dependency on the people. Before the sentiments impressed on their minds by the mode of their elevation, can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there for ever to remain, *unless a faithful discharge of their trust shall have established their title to a renewal of it.*

On this view, the imposition of term limits by the states, which would remove the incentive for a "faithful discharge of their trust" from members of Congress, would be positively inimical to the theory on which representatives are to be kept responsive to the people. Hamilton made the same argument in defense of the Convention's refusal to impose term limits on the President, explaining that such a restriction would cause "a diminution of the inducements to good behavior." *The Federalist* No. 72, at 367.

It also bears some consideration that the Framers did not imagine that term limits would be imposed to preclude service in Congress — and plainly believed that lengthy service by at least some members was essential to the sound functioning of the Legislative Branch. Madison thus predicted that

A few of the members, as happens in all such assemblies, will possess superior talents, will by frequent re-elections, become members of long standing; will be thoroughly masters of the public business * * *. The greater the proportion of new members, and the less the information of the bulk of the members, the more apt they will be to fall into the snares that may be laid for them.

The Federalist No. 53, at 274. See *The Federalist* No. 62, at 316 ("[t]he mutability in the public councils, arising from a rapid succession of new members, however qualified they may be, points out in the strongest manner, the necessity of some stable institution in the government"). Again, Hamilton made the same argument regarding the omission of term limits for the President, explaining that continued service permitted the people "to prolong the utility of his talents and virtues, and to secure to the government, the advantage of permanency in a wise system of administration." *The Federalist* No. 72, at 367.

C. Post-Ratification History

Finally, post-ratification developments confirm that the qualifications stated in the Constitution were understood to be exclusive. Respondents describe the reaction of the states to the ratification of the Constitution, and we will not repeat their arguments here. Instead, we focus on the 1807 case of William McCreery, in which *Congress* first addressed the question whether states could add to the constitutional qualifications. The McCreery episode was addressed at length in *Powell*, 395 U.S. at 542-543, where it was described as shedding considerable light on the intent of the Framers. See *id.* at 547 ("the precedential value of [congressional exclusion] cases tends to increase in proportion to their proximity to the Convention in 1787").

McCreery's case involved an 1802 Maryland law establishing an additional residency requirement; McCreery, an incumbent congressman who had been re-elected, was alleged to be ineligible for service because he did not satisfy that requirement. See *Powell*, 395 U.S. at 542.⁷ The House

⁷ The Maryland law created a district entitled to send two representatives to the House of Representatives, providing that one had to be a resident of Baltimore County and the other a resident of Baltimore City. McCreery lived in Baltimore City

Committee of Elections — chaired, as it happens, by Rep. William Findley, the notable anti-federalist who had opposed the Constitution (in part) because of its failure to permit term limits for members of Congress (see Eid & Kolbe, *supra*, at 33) — determined that the Maryland law could not be constitutionally applied because the qualifications stated in the Constitution are exclusive. Petitioner USTL (Br. 46 n.66) nevertheless dismisses the McCreery affair with the bald declaration that “the full House rejected the Committee’s report and declined to decide that the Maryland law was unconstitutional.” See also Ark. Br. 47. That assertion, however, does not begin to do justice to the episode.

In resolving that McCreery should be seated,

The committee [of Elections] proceeded to examine the Constitution, with relation to the case submitted to them, and find that qualifications of members are therein determined, without reserving any authority to the State Legislatures to change, add to, or diminish those qualifications * * * .

17 Annals of Cong. 871. Rep. Findley then explained that “[t]he Committee of Elections considered the qualifications of members to have been unalterably determined by the federal Convention, unless changed by an authority equal to that which framed the Constitution at first; that neither the State nor the Federal Legislatures are vested with the authority to

when first elected to Congress, but spent the summers at his farm in Baltimore County. It was alleged that McCreery, after his election to the House, spent the winters in Washington, D.C., and the summers in Baltimore County, ceasing to reside in Baltimore City at all. In the election at issue, the first-place finisher resided in Baltimore County; McCreery, who finished second, claimed the seat for Baltimore City. The third-place finisher, who lived in Baltimore City, argued that McCreery was ineligible to serve. See 17 Annals of Cong. 871 (1807).

add to those qualifications, so as to change them.” *Id.* at 872.

In expanding on why this is so, Rep. Findley added:

The qualifications of the National Legislature are of a national character, and as such must be uniform throughout the nation, and prescribed by the authority of the nation, and by it exclusively; but no State Legislature is vested with national authority, they cannot make citizens for the nation, nor prescribe qualifications either for citizens or for Executive officers of the nation, much less can they prescribe qualifications for the National Legislature, other than the nation itself has prescribed, nor abridge the Constitutional power of Congress to decide on the qualifications of its own members, agreeably to the rules prescribed by the Constitution * * * .

It is a fundamental principle in a free government that the citizens should be protected in the enjoyment of all their natural rights * * * . It is the natural right of all men to choose whom they please, without regard to age, residence, etc., to represent and advocate their interests; but it is necessary for the protection of society that this right be abridged, but it ought to be no further abridged than is absolutely necessary for the safety of society * * * ; and in the United States the society have decided on this principle by their general and ratifying conventions, and they have delegated no authority even to Congress, much less to States, to alter or add to or diminish these qualifications.

17 Annals of Cong. 873.

Those who defended the seating of Rep. McCreery advanced several principles. One was what should, by now,

be a familiar theory of democracy: "that there was a principle in a Republican Government, of as much importance as any other, as respected the safety of the Government, that the qualifications of the people elected should be firm, steady, and unalterable." 17 Annals of Cong. 887 (Rep. Smilie). A second rested on policy: that "if the State Legislature had the right to prescribe in what part of the same district, and for what length of time, each of the Representatives should reside, they had also a right to prescribe in what street or what house of a street they must reside, and for what length of time." *Id.* at 873 (Rep. Findley). And a third was the intent of the Framers: "when the framers of the Constitution undertook deliberately to enumerate the qualifications, it was presumable they meant that no others should be necessary." *Id.* at 877 (Rep. Sturges).

As this background suggests, the participants in the McCreery debate understood that they were settling a matter of great constitutional importance, and they made frequent reference to *The Federalist* and other materials from the ratification period. See Eid & Kolbe, *supra*, at 34 n.176.⁸

⁸ It is notable that, when Rep. Key argued that the exclusivity of the qualifications stated in the Constitution "is explicitly stated and ably maintained" in *The Federalist* (17 Annals of Cong. 915), his opponents pointedly did not disagree. Instead, Rep. Randolph, leader of the forces arguing in favor of state authority, declared:

The gentleman from Maryland [Rep. Key] had cited as authority, what Mr. [Randolph] had not expected would ever have been produced in the House as such — commentaries on the Constitution made anterior to its going into operation. * * * These opinions had no weight with Mr. [Randolph]. He had not been in the habit of paying great deference to the political opinions of the late General Hamilton, or to those of the negotiator of the Treaty of London, nor did he think

And a very substantial majority of those who spoke agreed that the Maryland law could not be constitutionally applied. In addition to those already cited, see, *e.g.*, 17 Annals of Cong. 886 (Rep. Clay) ("If the Legislature of the States had no Constitutional right to narrow the qualifications, they had no right to superadd to them"); *id.* at 890, 892 (Rep. Alston) ("any person possessed of qualifications, as required by the Constitution, and who was duly elected, was entitled to his seat, notwithstanding State regulations"); *id.* at 892, 893 (Rep. Rowan) ("the qualifications for a representative to Congress were unalterably fixed by the Convention; the Constitution was the place to look for them, and not the statute book, for if it were, they would float on popular caprice"); *id.* at 896, 897 (Rep. Johnson) ("la[ying] it down as a principle, that every contraction of qualifications for Representatives was an abridgment of the liberty of the citizen. The power of adding other qualifications than those fixed by the Constitution would * * * be a breach of the right of suffrage"); *id.* at 906, 908 (Rep. Quincy) (additional qualifications "a direct violation of the rights reserved to the people"); *id.* at 909, 910 (Rep. Key) ("there can exist no doubt but that all legislation is closed as to the qualifications of the elected or Representative"); *id.* at 917, 918 (Rep. Howard) ("the qualifications of members was a fundamental regulation fixed by the Constitution, and unalterable but by a change or amendment of the instrument itself"); *id.* at 927, 928 (Rep. Desha) ("These three [qualifications stated in the Constitution] are all the qualifications required").

that the third member of the gentleman's political trinity entitled to more consideration than his worthy co-adjutors.

Id. at 944. Needless to say, Rep. Randolph's views about Madison, Hamilton, and Jay have not survived the test of time.

To be sure, a "small but vocal group of dissenters," led by Rep. Randolph, argued that the states had the authority to add qualifications to those stated in the Constitution. Eid & Kolbe, *supra*, at 37. See 17 Annals of Cong. 880 (Rep. Sawyer); *id.* at 882, 942 (Rep. Randolph); *id.* at 889 (Rep. Bibb); *id.* at 898 (Rep. Love). This minority expressly recognized that they would be outvoted on the constitutional issue; Rep. Randolph declared bitterly that "he trusted at no far distant day, * * * the decision *about to be made in the case of Mr. McCreery* would be set aside, as a precedent taken from hard, unconstitutional times." 17 Annals of Cong. 942 (emphasis added). To avoid this outcome, Rep. Randolph tried to persuade the House to sidestep the constitutional issue by seating McCreery on the ground that he in fact "ha[d] the qualifications required by the law of Maryland." 17 Annals of Cong. 1234. This proposal, which would effectively have resolved the constitutional issue in favor of state authority, was defeated by a vote of 92-8. *Id.* at 1237. Eventually, however, the House, evidently exhausted by more than a month of debate, approved by a vote of 89-18 a resolution declaring simply "[t]hat William McCreery is entitled to his seat in this House." *Ibid.*

In this setting, the McCreery episode cannot be disregarded because the full House did not in terms adopt the conclusions of the Committee of Elections. "[G]iven the posture of the McCreery[] dispute, the Committee's report, and the substance of the ensuing debate on the House floor, the House's attempt to decide the case on non-constitutional grounds is unpersuasive since the vast majority of House Members had rejected a state's right to impose substantive qualifications on Congress." Eid & Kolbe, *supra*, at 38. The clear conclusion of the substantial majority of the House members to address the issue — in a debate conducted only 20 years after the Convention, and maintained in part by participants in the ratification process — must carry great weight. And those who spoke to the point understood what

the Framers plainly intended: that the qualifications for service in Congress stated in the Constitution are exclusive.

CONCLUSION

The decision of the Arkansas Supreme Court should be affirmed.

Respectfully submitted.

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OCTOBER 1994

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

U.S. TERM LIMITS, INC., ARKANSANS FOR
GOVERNMENTAL REFORM, INC., FRANK GILBERT,
GREG RICE, LON SCHULTZ, and SPENCER PLUMLEY,

Petitioners,

vs.

RAY THORNTON, et al.,

Respondents.

WINSTON BRYANT, ATTORNEY GENERAL OF ARKANSAS,

Petitioner,

vs.

BOBBIE E. HILL, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

BRIEF *AMICUS CURIAE* OF THE
CALIFORNIA DEMOCRATIC PARTY,
CONGRESSMAN HOWARD BERMAN, AND
MARIE HARRIS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.	iii
INTRODUCTION	1
THE INTERESTS OF THE AMICI CURIAE	2
SUMMARY OF ARGUMENT	6
ARGUMENT.	9
I. IF AMENDMENT 73 SURVIVES RE- VIEW UNDER THE QUALIFICA- TIONS CLAUSES ON THE GROUND THAT IT DOES NOT ESTABLISH NEW QUALIFICATIONS FOR CON- GRESS, THEN IT CANNOT BE EQUATED WITH ABSOLUTE TERM LIMITS FOR PURPOSES OF REVIEW UNDER THE FIRST AND FOUR- TEENTH AMENDMENTS.	9
II. BALLOT ACCESS TERM LIMITS VIOLATE THE FREEDOM OF ASSO- CIATION OF POLITICAL PARTIES AND THEIR ADHERENTS BECAUSE THEY (1) PROHIBIT A PARTY FROM NOMINATING A PARTY MEMBER WHO IS FULLY QUALIFIED FOR ELECTION TO CONGRESS, AND (2) MAKE IT VIRTUALLY IMPOSSI- BLE FOR A PARTY TO UNIFY IT- SELF AROUND A SINGLE CANDI- DATE AT THE GENERAL ELECTION . . .	12

	Page
III. ARKANSAS AND OTHER STATES THAT HAVE ADOPTED BALLOT ACCESS TERM LIMITS IMPOSE A GRAVE HANDICAP ON QUALI- FIED CONGRESSIONAL CANDI- DATES FOR THE SOLE PURPOSE OF PREVENTING THEIR ELECTION. THIS INVIDIOUS DISCRIMINATION VIOLATES THE RIGHT OF SUP- PORTERS OF THE HANDICAPPED CANDIDATES TO EQUAL PROTEC- TION.19
CONCLUSION.28
APPENDIX A CALIFORNIA ELECTIONS CODE §25003 . . .	A1
APPENDIX B CALIFORNIA DEMOCRATIC PARTY JUNE 1993 RESOLUTION	B1

TABLE OF AUTHORITIES		Page
Cases		
<i>American Party of Texas v. White</i> , 415 U.S. 767 (1974).20, 22
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983).		8, 20
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).25
<i>Bullock v. Carter</i> , 405 U.S. 134 (1972).15, 20
<i>Clements v. Fashing</i> , 457 U.S. 957 (1982).20
<i>Clough v. Guzzi</i> , 416 F. Supp. 1057 (D. Mass. 1976)23
<i>Eu v. San Francisco County Democratic Central Committee</i> , 489 U.S. 214 (1989).		7, 12, 13, 19
<i>Gould v. Grubb</i> , 14 Cal.3d 661, 122 Cal. Rptr. 377, 536 P.2d 1337 (1975).23
<i>Jenness v. Fortson</i> , 403 U.S. 431 (1971).20
<i>Kusper v. Pontikes</i> , 414 U.S. 51 (1973).12

	Page
<i>Legislature v. Eu</i> , 816 P.2d 1309 (Cal. 1991), cert. denied 112 S. Ct. 1292 (1992)	10, 11
<i>Lubin v. Panish</i> , 415 U.S. 709 (1974).	20, 22, 27
<i>Mann v. Powell</i> , 333 F. Supp. 1261 (N.D. Ill. 1969)	23
<i>McLain v. Meier</i> , 637 F.2d 1159 (8th Cir. 1980).	23
<i>Sangmeister v. Woodard</i> , 565 F.2d 460 (7th Cir. 1977)	23
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	20, 21
<i>Tashjian v. Republican Party of Connecticut</i> , 479 U.S. 208 (1986).	3, 7, 12, 13, 16, 19
<i>Ulland v. Growe</i> , 262 N.W.2d 412 (Minn. 1978)	23
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968)	19, 20

State Statutes

6A Arkansas Code of 1987 Annot.	
§ 7-1-101(4) (1993).	14
§ 7-5-525(c) (1993).	14
§ 7-7-102(a) (1993).	14
§ 7-7-104(a) (1993).	14

California Elections Code

§ 6401	3
§ 6610	18
§ 6617	18
§ 6651.5	18
§ 6653	18
§ 6655	18
§ 25003	2, 4-6, 18, 24

Constitution

United States Constitution

Article I, § 4	11
First Amendment	1, 2, 6, 9-11, 13, 18, 14, 29
Fourteenth Amendment	1, 2, 6, 9, 10, 18, 24, 29

Other Authorities

Andrew Gelman & Gary King, "Estimating Incumbency Advantage without Bias," 34 <i>American Journal of Political Science</i> (1990)	27
Gary C. Jacobson, <i>The Electoral Origins of Divided Government: Competition in U.S. House Elections</i> (1990)	26
Gary C. Jacobson, <i>The Politics of Congressional Elections</i> (1987)	26
Glenn R. Parker, "Members of Congress and their Constituents: The Home-Style Connection," <i>Congress Reconsidered</i> (Lawrence C. Dodd & Bruce I. Oppenheimer, eds., 4th ed. 1989).	26

	Page
James L. Payne, "The Personal Electoral Advantage of House Incumbents, 1936-1976," 8 <i>American Politics Quarterly</i> (1980)	27
John A. Ferejohn, "On the Decline of Competition in Congressional Elections," 71 <i>American Political Science Review</i> (1977)	26
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Lee Atwater, "Altered States: Redistricting Law and Politics in the 1990s," 6 <i>Journal of Law & Politics</i> (1990)	26
Lowenstein, "Are Congressional Term Limits Constitutional?" 18 <i>Harvard Journal of Law & Public Policy</i> (forthcoming 1994)	9
Michael Barone & Grant Ujifusa, <i>The Almanac of American Politics 1994</i> (1993)	5
Morris P. Fiorina, <i>Congress: Keystone of the Washington Establishment</i> (1st ed. 1977)	26
<i>Vital Statistics on American Politics</i> (4th ed. 1994)	24
William H. Riker, <i>Liberalism Against Populism</i> (1982)	17
William H. Riker, "The Number of Political Parties: A Reexamination of Duverger's Law," 9 <i>Comparative Politics</i> (1976)	17

**BRIEF AMICUS CURIAE OF THE
CALIFORNIA DEMOCRATIC PARTY,
CONGRESSMAN HOWARD BERMAN,
AND MARIE HARRIS IN SUPPORT
OF RESPONDENTS**

INTRODUCTION

The litigants are addressing with skill and diligence the issues arising in this case under the Qualifications Clauses of the Constitution. We fear, however, that the litigants have given too little attention to the infringement of fundamental First and Fourteenth Amendment rights that would follow if this Court were to accept Petitioners' contention that Arkansas' Amendment 73 may be sustained as a mere ballot access restriction that imposes no new qualifications.

Amendment 73, working together with Arkansas' prohibition of write-in votes in primary elections, flatly denies to political parties the right to nominate the candidates of their choice, if party voters happen to favor an individual affected by Amendment 73. This denial occurs despite the state's claim that affected individuals are fully qualified to run for Congress. By taking away parties' freedom to select their own candidates, Arkansas drastically infringes rights of partisan association in plain contravention of this Court's recent decisions.

Amendment 73 is also unconstitutional because it excludes qualified candidates from the ballot, not because they are unable to demonstrate significant voter support, but because the state believes it is too probable that they will be elected. Petitioners and their supporters have made no serious attempt to defend Amendment 73's serious infringement of associational rights or its invidious favoritism.

We believe that the litigants, understandably preoccupied with the question *whether* Amendment 73 is a qualification, have thought too little about the constitutional issues presented in the event that Amendment 73 is deemed *not* to impose a qualification. The sole purpose of this amicus brief is to fill that gap.¹

THE INTERESTS OF THE *AMICI CURIAE*

California Elections Code § 25003² limits the terms of representatives in Congress in a manner substantially identical to Arkansas Amendment 73.³ House members are limited to three terms and Senate members to two terms. Write-in votes may be cast in the general election for individuals who have reached these limits. The *stare decisis* effect of this Court's decision in the present case will almost certainly determine whether the California term limits ever take effect.

¹ Neither of the main briefs for Petitioners gives more than cursory attention to the First and Fourteenth Amendments. See Brief for Petitioners U.S. Term Limits, Inc., et al. at 22-23 n.27; Brief for the State Petitioner, at 33-34 n.38. Each relies on decisions upholding absolute term limits, a reliance that the next section of this brief demonstrates is invalid. The petition of the State Petitioner gave slightly more attention to the First and Fourteenth Amendments, though even there the discussion was confined to a single footnote. The arguments advanced in that footnote are addressed in Part III of this brief.

² This section is reprinted in Appendix A to this brief. It was adopted as initiative Proposition 164 in 1992.

³ There are certain differences between the Arkansas and California provisions. For example, the Arkansas but not the California limits are "life-long." These differences have no bearing on the interests of the California Amici in this case, nor on the arguments tendered in this brief.

The California Democratic Party ("CDP") has a vital associational interest in assuring that its nominees for partisan office are those chosen by Democratic voters in primary elections open to all Democratic candidates qualified to hold the office in question.⁴ The CDP also has a vital interest in assuring that the nominees chosen by its adherents in primary elections appear on the general election ballots, so that the CDP may compete fairly against opposing parties. Finally, the CDP has a vital interest in assuring that its primary elections result in a single, recognized Democratic candidate, behind whom party adherents can unite in the general election, so that the Democratic vote is not split among opposing candidates, each with a colorable claim to represent the CDP.⁵

All of these associational interests have been recognized by this Court as central to the functioning of the major political parties, yet each of these recognized interests will be vitiated if this Court reverses the decision of the Arkansas Supreme Court.

Howard Berman is a Democrat who represents California's 26th Congressional District (constituting roughly the eastern half of Los Angeles' San Fernando

⁴ By "all Democrats," we refer to Democrats who satisfy minimal durational requirements for affiliation with the CDP. See California Elections Code § 6401. Although such requirements might theoretically be vulnerable to attack under *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), the CDP does not object to them, because their effect is to strengthen the integrity of party primaries, in sharp contrast to ballot access term limits, which threaten to create havoc within the party. See Argument, Part II, *infra*.

⁵ At its June 1993 Executive Board Meeting, the CDP formally declared its intention to open its primaries to all qualified Democrats regardless of their length of service in office. A copy of the resolution adopted on that occasion is set forth in Appendix B to this brief.

Valley) in the United States House of Representatives. Berman has represented this general area in the House since his original election in 1982. He is seeking reelection as a Democrat this year and, if he is successful, he anticipates doing the same at least through the 1998 election.⁶ However, if California Elections Code § 25003 goes into effect, in 1998 Berman will be ineligible to appear on the ballot in either the primary or the general election. For him to seek the Democratic nomination in the primary, even as a write-in candidate, would be an exercise in futility, because under no circumstances could his name appear on the general election ballot as the Democratic Party candidate. California Elections Code § 25003 does not purport to disqualify Berman from seeking reelection in 1998, but will bar him from running under the auspices of the CDP and will force him to run *against* the Democratic candidate who is nominated at the primary. This will run directly contrary to his desire as a Democrat to help maintain unity within his party so that it may pursue its political goals. Accordingly, California Elections Code § 25003, if permitted to go into effect, will drastically impair Berman's right to associate with the CDP and with Democratic voters in the 26th Congressional District.

Marie Harris is a loyal and registered Democratic voter who resides in California's 26th Congressional District. Aware that "[t]here are few House members who have made such an imprint on legislation in so

⁶ To facilitate exposition, this brief will assume that Berman is reelected in 1994 and 1996, and that he seeks reelection in 1998. Obviously, each of these assumptions is subject to numerous contingencies.

many areas as Howard Berman"⁷ Harris voted for Berman in the June 1994 Democratic primary, intends to vote for Berman in the general election, and believes it is probable that she will continue to want to vote for Berman in both Democratic primaries and in general elections for the foreseeable future. Harris believes that Berman is peculiarly able to represent her and other San Fernando Valley voters, because although he is generally a mainstream congressional Democrat, he is willing and able to follow an independent course when his conscience or the needs of his district so dictate. For example, as described by *The Almanac of American Politics*, he has worked successfully in concert with conservative Republicans such as Henry Hyde of Illinois and David Dreier of California to enact important legislation.⁸ Harris believes that it is unlikely that any House candidate in the 26th District will combine Berman's legislative effectiveness and his particular independent policy stance. Yet, under California Elections Code § 25003, beginning in 1998, Harris will be presented with a dilemma: should she vote for Berman or for some other Democratic candidate who will not be barred from the ballot and may therefore have the better chance of defeating candidates of other parties? However Harris resolves this dilemma, her right to vote will be significantly impaired by reason of the state's discrimination against the candidate she favors. In addition, her right to associate with her fellow Democrats in the 26th Congressional District and with the CDP by nominating the individual of their choice as the candidate of the Democratic Party will be greatly impaired.

⁷ Michael Barone & Grant Ujifusa, *The Almanac of American Politics 1994*, at 151 (1993).

⁸ *Id.* at 151-52.

For the foregoing reasons, the associational rights of the CDP, Berman, and Harris (collectively referred to herein as "the California Amici") are at stake in the present case, as is Harris' right, under the Equal Protection Clause, to vote free of invidious discrimination by the state against the candidate she prefers.

SUMMARY OF ARGUMENT

1. The degree to which "ballot access term limits"⁹ infringe associational and equal protection rights under the First and Fourteenth Amendments has been greatly underestimated because of an erroneous assumption that "ballot access term limits" can be equated with "absolute term limits" for First and Fourteenth Amendment purposes. States have considerable leeway under the First and Fourteenth Amendments to establish qualifications for public office. But the Qualifications Clauses deprive the states of this leeway in the case of elections for Congress. Thus, to avoid running afoul of the Qualification Clauses, it would have to be accepted that congressional ballot access term limits do not impose state-mandated congressional qualifications, but instead merely restrict ballot access for certain qualified congressional candidates. Congressional ballot access term limits would therefore have to undergo review, under the First and Fourteenth Amendments, as ballot exclusions aimed against fully qualified candidates for election to Congress.

⁹ By "ballot access term limits" we refer to provisions — such as Amendment 73 and California's Section 25003 — which deny access to the ballot for candidates who have served a specified number of terms, but which permit write-in votes for such candidates. By "absolute term limits" we refer to provisions that deny the ability of such candidates to be elected by any means.

2. Congressional ballot access term limits cannot withstand such an analysis. They constitute a major infringement of the associational rights of political parties and their adherents, vastly more disruptive than the infringements that were struck down by this Court in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), and *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989). In those cases, the state made it more difficult for political parties to nominate the candidates of their choice, either by controlling who could vote in the parties' primaries or by preventing party committees from endorsing candidates. This Court responded by affirming that "[f]reedom of association means . . . that a political party has a right to . . . select a 'standard bearer who best represents the party's ideologies and preferences' ". [Citation omitted.] [Check form] Ballot access term limits even more seriously interfere with the parties' choice of standard bearer, by *prohibiting* the party from nominating the individual who may well best represent the party's ideology and preferences. But this is not the worst. Ballot access term limits impair the fundamental purpose of a party primary. The limits permit an individual who is barred from the ballot to run as a write-in candidate in the general election. If this option is exercised, party division and conflict are guaranteed. Party adherents are confronted with a grave dilemma. Who is the true standard bearer of the party — the candidate whose name is on the ballot as the winner of the party's primary, or the individual who has borne the party's standard successfully in previous elections, and must now run as a write-in? If, as is almost inevitable, party voters disagree on this question, the primary's purpose, which is to unite the party behind a single candidate, is destroyed by government fiat.

3. When this Court has reviewed ballot access restrictions, it has weighed the state's purposes against the imposition on a group of voters whose party or candidate is denied access. E.g., *Anderson v. Celebrezze*, 460 U.S. 780 (1983). But in each of these ballot access cases, the state's purposes — for example, minimizing voter confusion — have been directed toward facilitating the ability of the voters to elect the candidates of their choice. In contrast, ballot access term limits are intended to increase the likelihood that one set of qualified candidates defeat another set of qualified candidates. This Court has never suggested that it is proper for a state to deny ballot access to candidates on the ground that otherwise the voters are too likely to elect those candidates. For the state to regulate ballot access in order to control election results strikes at the heart of democracy and constitutes unusually invidious discrimination in violation of the Equal Protection Clause.

ARGUMENT

I.

IF AMENDMENT 73 SURVIVES REVIEW UNDER THE QUALIFICATIONS CLAUSES ON THE GROUND THAT IT DOES NOT ESTABLISH NEW QUALIFICATIONS FOR CONGRESS, THEN IT CANNOT BE EQUATED WITH ABSOLUTE TERM LIMITS FOR PURPOSES OF REVIEW UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

Petitioners want to have it both ways. Lacking confidence that this Court will overthrow the extraordinarily well-established principle that the qualifications for Congress stated in the Constitution are exclusive,¹⁰ they proclaim: Amendment 73 does *not* impose a qualification, it is merely a procedural measure, regulating access to the ballot.

Yet, when it is time to defend Amendment 73 under the First and Fourteenth Amendments, they assume that they can rely on the rationale of cases upholding absolute term limits, even though those limits unquestionably

¹⁰ This Amicus brief assumes the correctness of this principle. We anticipate that this issue will be presented adequately by the parties, and it is dealt with comprehensively in a forthcoming article by one of the signers of this brief. See Lowenstein, "Are Congressional Term Limits Constitutional?" 18 *Harvard Journal of Law & Public Policy* 1 (forthcoming 1994). Professor Lowenstein's article also deals with "ballot access term limits" (which he refers to as "quasi-term limits") under the First and Fourteenth Amendments.

did establish qualifications for state and local offices.¹¹

Unquestionably, states have considerable leeway to establish qualifications for public office so far as the First and Fourteenth Amendments are concerned. A candidate's length of term in office could be such a qualification. It is therefore not surprising that judicial decisions to date have upheld absolute term limits for state office against attacks brought under these amendments. See, e.g., *Legislature v. Eu*, 816 P.2d 1309 (Cal. 1991), *cert denied*, 112 S.Ct. 1292 (1992). Were it not

¹¹ See, e.g., State of Arkansas' Petition in No. 93-1828, at 22-23 n.32 (string-citing cases upholding absolute term limits); Brief for Respondents Jay Dickey and Representative Tim Hutchinson Supporting Petitioners, at 26 n.6 and 36 n.14; Amicus Brief of United States Justice Foundation, at 12-13; Amicus Brief of Citizens for Term Limits and Pacific Legal Foundation, at 21-22; Amicus Brief of State of Washington, at 7-8 and 9 n.5.

It is not only the Petitioners who mistakenly assume that the state interests justifying absolute term limits can be applied to ballot access term limits, despite the fact that the latter ostensibly do not establish qualifications for office. Justice Cracraft, dissenting in the Arkansas Supreme Court, made the same error:

In our deliberations, we have applied [the] balancing test to [the absolute term limits applicable to state officials in] Sections 1 and 2 of Amendment 73 and found that the state's interest in preventing the perceived evils outweighs the First and Fourteenth Amendment rights of state level candidates and voters therefor. In my opinion, since we have decided that Amendment 73's lifetime bar on state level incumbents passes Fourteenth Amendment muster, it must necessarily follow that the less stringent restrictions placed on members of Congress easily pass this same test.

(No. 93-1456, Pet. App. at 39a).

for the exclusionary effect of the congressional qualifications specified in the Constitution, states presumably would also have the power to set reasonable qualifications for Congress, subject to being overruled by Congress, under Article I, § 4 of the Constitution.

However, if ballot access term limits for Congress, like Arkansas' Amendment 73, are to be taken seriously as anything other than unconstitutional congressional qualifications, then the case must proceed under the assumption that the state regards term-limited individuals as fully qualified candidates. State interests that might justify qualifications for office cannot be tendered in support of Amendment 73 which, professedly, does not establish qualifications for office. To the contrary, state efforts to prevent *qualified* candidates from getting elected constitute a form of state favoritism that is highly suspect under both the First Amendment and the Equal Protection Clause.

It follows that decisions upholding absolute term limits, such as *Legislature v. Eu*, *supra*, are of no assistance to Petitioners in the present case. Either Amendment 73 establishes qualifications, in which case it violates the constitutional ban, or it does not, in which case it cannot be defended on the basis of the state's usual power to set qualifications for office. Rather, the state must carry the burden of justifying its harsh discrimination *among* qualified candidates.

II.

BALLOT ACCESS TERM LIMITS VIOLATE THE FREEDOM OF ASSOCIATION OF POLITICAL PARTIES AND THEIR ADHERENTS BECAUSE THEY (1) PROHIBIT A PARTY FROM NOMINATING A PARTY MEMBER WHO IS FULLY QUALIFIED FOR ELECTION TO CONGRESS, AND (2) MAKE IT VIRTUALLY IMPOSSIBLE FOR A PARTY TO UNIFY ITSELF AROUND A SINGLE CANDIDATE AT THE GENERAL ELECTION.

"The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986). The most important associational right of political parties and their adherents is their ability to choose freely their nominees for public office, because selecting candidates is "the 'basic function' " of parties. *Id.* at 216 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973)). The parties' constitutional freedom to nominate the candidates they choose was reaffirmed in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 224 (1989):

Freedom of association means . . . that a political party has a right to . . . select a "standard bearer who best represents the party's ideologies and preferences." [Citation omitted.]

It would make little sense for parties to claim a right to nominate candidates who are unqualified to hold office. Therefore, an absolute term limit, which disqualifies individuals from holding office, does not

infringe parties' associational rights. But ballot access term limits do not purport to disqualify any individuals from being elected to and serving in Congress. Rather, they prohibit a party from nominating a term-limited candidate, despite the fact that the candidate is fully qualified to be elected, is a party member in good standing, and has repeatedly been elected to Congress as the candidate of the party in recent elections.

This is a far greater infringement on the associational freedom of parties to nominate candidates of their choice than was present in either *Tashjian* or *Eu*. In *Tashjian*, the Court held that a party had a right to permit non-party members to vote in its primaries. Three dissenting justices, who did not believe the party's rights extended this far, nevertheless agreed that "[t]he ability of the members of the Republican Party to select their own candidate . . . unquestionably implicates an associational freedom." 479 U.S. at 235-36 (Scalia, J., dissenting, joined by Rehnquist, C.J., and O'Connor, J.). Ballot access term limits directly interfere with the ability of members of parties to select their own candidates, and therefore violate the parties' associational rights under the views expressed by all members of the Court who reached the First Amendment question in *Tashjian*.¹²

In *Eu*, a statute prohibiting party committees from endorsing candidates in primary elections was struck down. The Court declared that depriving a party of the power to endorse candidates in its primaries "suffocates" the party's right of association. 489 U.S. at 224. If to prevent a party committee from *recommending* that primary voters nominate a particular candidate is to "suffocate" a party's right of association, then flatly to

¹² Justice Stevens dissented in *Tashjian* on grounds unrelated to parties' rights of association.

prohibit the voters from nominating the candidate is to vaporize the right.

Arkansas' Amendment 73 provides that a congressional candidate who equals or exceeds the specified number of prior terms "shall not be eligible to have his/her name placed on the ballot for election."¹³ The Amendment does not specify from which ballot(s) the candidate's name is excluded, but since certification as a candidate is also barred, the candidate apparently is excluded from the ballot in both primary and general elections.¹⁴ Furthermore, write-in ballots are not counted in Arkansas primaries.¹⁵ Thus, a term-limited party member who is fully qualified to be elected to Congress from Arkansas is flatly prohibited from

¹³ Amendment 73, § 3(a) and (b).

¹⁴ Party nominees in Arkansas are certified as candidates by virtue of either winning or being unopposed in the party primary. See 6A Ark. Code of 1987 Annot. § 7-7-102(a) (1993).

An alternative interpretation might be suggested, namely that the term-limited candidate could appear on the *primary* ballot, and that if he or she won the primary or were unopposed, no candidate would be certified by the party as its nominee, and no congressional candidate would appear on the *general* election ballot under that party's label. However, this interpretation of Amendment 73 appears to be ruled out by other Arkansas statutory provisions. Under 6A Ark. Code of 1987 Annot. § 7-1-101(4) (1993), a "vacancy in nomination" occurs if the party selects a candidate at the primary who cannot be certified. Under 6A Ark. Code of 1987 Annot. § 7-7-104(a) (1993), this vacancy would be filled by alternate means, which, by virtue of Amendment 73, would have to mean by selection of someone other than the term-limited candidate. Accordingly, the most reasonable interpretation of Amendment 73 is that the term-limited candidate is completely banned from the primary election.

¹⁵ *Id.* at § 7-5-525(c).

associating with his or her party and its adherents by seeking the party's nomination at the primary; party members are flatly prohibited from associating with that candidate by voting for him or her in the primary; and the party as a whole is unable to nominate the candidate of its choice.

Suppose, for example, that Respondent Blanche Lambert, who represents the Arkansas 1st Congressional District, is reelected in 1994 and 1996 and chooses to run again in 1998. Unable to run in the Democratic primary, even as a write-in, her only recourse will be to run as a write-in candidate in the general election. Not only will she be deprived of the opportunity to associate with the Democratic Party as its candidate, but she will be forced to run against the candidate who received a majority in the Democratic primary. To give her a choice between waiving her right to run for Congress — which the ballot access term limit supposedly protects — and having to *oppose* the political party to which she adheres is an extreme and even perverse denial of her right of partisan political association.

Thus, in *Bullock v. Carter*, 405 U.S. 134 (1972), the state attempted to defend high filing fees for candidates who wished to run in party primaries on the ground that the candidates could avoid the filing fees by running as independents. This Court responded that "we can hardly accept as reasonable an alternative that requires candidates and voters to abandon their party affiliations in order to avoid the burdens of the filing fees imposed by state law." 405 U.S. at 146-47. Amendment 73 goes even further by making the abandonment of party affiliation an absolute condition of running for Congress.

Party adherents and the party itself are equally stripped of their rights, beyond the basic deprivation of not being allowed to nominate the candidate of their choice. Amendment 73 turns the act of voting into a guessing game for adherents of the party in question — Democrats, in the example of Rep. Lambert. A Democratic voter who is indifferent as between Lambert and the Democrat whose name appears on the ballot, but who strongly prefers either Democrat to candidates of other parties, would have to guess which Democrat is likely to receive the most votes of other Democratic voters.

In *Tashjian* the Court noted that preventing nonparty members from voting in a party primary “deprives the Party and its members of the opportunity to inform themselves as to the level of support for the Party’s candidates among a critical group of electors.” 479 U.S. at 221. The Court thus recognized that one of the crucial benefits that parties and their adherents derive from primaries is the information primaries provide about the support for different candidates within the party. But the most vital information by far that is provided by the primary is the identification of a winner, i.e., the nomination of a candidate to represent the party in the general election. The primary thus serves as a coordinating device that enables voters who wish to support a given party to be confident that they can do so by voting for a given candidate. Amendment 73, by turning the general election into a guessing game for adherents of a party with a term-limited candidate who chooses to run as a write-in, undermines the coordinating function of the primary and thereby impairs the freedom of the party adherents to associate with one another effectively.

The problem for the party as a whole, of course, is that Amendment 73’s conversion of the general election into a guessing game for voters threatens the party with electoral defeat despite the possibility that it enjoys majority support within the state or congressional district. The disaster that may confront a party whose voters are split between two candidates is certainly not theoretical. A famous historical example occurred in the 1912 presidential election, when the Progressive (or “Bull Moose”) Party was formed by dissident Republicans who were opposed to the Republican incumbent, President Taft. The result was that Democrat Woodrow Wilson was elected with 42% of the popular vote, considerably less than the combined 51% received by the two Republicans, Roosevelt (27%) and Taft (24%).¹⁶

Of course, in a free society, parties have to take their chances that party splits will bring on electoral defeat, as happened to the Republicans in 1912. But parties also have the right to try to remain unified so as to avoid such splits. Amendment 73 deprives parties of that right by forcing division at *general* elections between the party nominee, who is listed as such on the ballot, and a write-in candidate, who by virtue of former primary and general election victories is almost certainly a credible claimant to party support. The state cannot impose ballot restrictions calculated to inflict serious, repeated disunity on political parties. Because Amendment 73 does exactly that, it violates the parties’ freedom of

¹⁶ See William H. Riker, *Liberalism Against Populism* 85-89 (1982) for a brief discussion of the 1912 election in the context of the electoral imperative of two unified parties that results from the American plurality-take-all electoral system. For a more extended theoretical discussion of this electoral imperative, see William H. Riker, “The Number of Political Parties: A Reexamination of Duverger’s Law,” 9 *Comparative Politics* 93 (1976).

association, in violation of the First and Fourteenth Amendments.¹⁷

¹⁷ In contrast to Arkansas, see note 16, *supra*, the California provisions may not absolutely exclude term-limited candidates from primaries. Arguably, such individuals may run as write-in candidates in primaries, and be "nominated" if they receive a plurality of votes. California Elections Code § 6610. California Elections Code § 25003 would prevent such a "nominee" from receiving a certificate of nomination under California Elections Code § 6617 and would prevent the candidate's name from appearing on the general election ballot. However, unlike Arkansas law, California Elections Code § 6655 permits only certain vacancies among a party's candidates to be filled by the parties for the general election, and these are limited to vacancies caused by death (California Elections Code § 6653) or by the candidate having been selected to fill another vacancy that is permitted to be filled (California Elections Code § 6651.5). These sections taken together might be interpreted to permit a term-limited candidate to run as a write-in in the primary, with the consequence that if he or she wins a plurality of votes, *no* candidate would appear under that party's label at the general election. The candidate could again campaign as a write-in at the general election, and would be elected if he or she received a plurality of votes.

If the California provisions are interpreted as suggested, they would be no more constitutional than the Arkansas provisions. First, the California provisions would still prevent the party and its adherents from nominating the candidate of their choice. The functional meaning of a party "nomination" under an electoral system that includes primaries and state-provided ballots, is that the party's nominee appears under the party label on the general election ballot. The state cannot avoid constitutional scrutiny by issuing a Pickwickian declaration that a candidate has been "nominated," when it denies to the candidate all the tangible incidents of nomination.

Second, it is true that the candidate would have a possible means of running in the general election without being forced to split his or her own party vote. But this benefit for the party is purchased at too steep a price. Voters favoring Rep. Berman in 1998, for example, would be forced at the primary either to vote for a less-favored

(continued)

III.

ARKANSAS AND OTHER STATES THAT HAVE ADOPTED BALLOT ACCESS TERM LIMITS IMPOSE A GRAVE HANDICAP ON QUALIFIED CONGRESSIONAL CANDIDATES FOR THE SOLE PURPOSE OF PREVENTING THEIR ELECTION. THIS INVIDIOUS DISCRIMINATION VIOLATES THE RIGHT OF SUPPORTERS OF THE HANDICAPPED CANDIDATES TO EQUAL PROTECTION.

Williams v. Rhodes, 393 U.S. 23 (1968), was the first of a series of cases in which this Court decided the constitutionality of petition requirements, filing fees, and other procedures governing ballot access for

(fn. continued)

candidate or to vote to deny their own party a place on the ballot, with the consequence of greatly increasing the likelihood of a victory for an opposing party. This is a much greater interference with the freedom of parties and voters to nominate whatever candidates they please than was present in *Tashjian* or *Eu*. Furthermore, Rep. Berman might make the tactical judgment that he has a better chance of winning one write-in campaign than two, and therefore he might decline to run in the primary. In this event, the party and its voters would be faced with the same severe inroads on freedom of association as discussed in the text. Since the candidate's choice not to run in the primary would have been the direct result of the state's discriminatory ballot access restriction, the infringement of associational rights unquestionably would be the result of state action.

candidates and political parties.¹⁸ As the Court stated in *Williams*, ballot access requirements burden two kinds of constitutional rights:

The right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.

393 U.S. at 30.

There are various state interests that justify ballot access restrictions, but these most certainly do not include the state's desire to enhance the prospects of one party or candidate over another. Thus, in *Williams*, the Court rejected the state's proposed interest of promoting a two-party system, because in reality the state was playing favorites:

The fact is, however, that the Ohio system does not merely favor a 'two-party system'; it favors two particular parties — the Republicans and the

¹⁸ See also *Jenness v. Fortson*, 403 U.S. 431 (1971); *Bullock v. Carter*, 405 U.S. 134 (1972); *Lubin v. Panish*, 415 U.S. 709 (1974); *Storer v. Brown*, 415 U.S. 724 (1974); *American Party of Texas v. White*, 415 U.S. 767 (1974); *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

Clements v. Fashing, 457 U.S. 957 (1982), is often included in this series of cases and, indeed, the analysis in the opinions in that case draws heavily on the earlier cases in the series. However, unlike the other cases in the series and unlike Amendment 73 (as characterized of necessity by appellants), the provisions in *Clements* established actual disqualifications for office. The exclusion from the ballot in that case followed as a matter of course from that disqualification.

Democrats — and in effect tends to give them a complete monopoly.

Id. at 32.

Amendment 73 denies ballot access to term-limited candidates for one reason and one reason only — to make it as difficult as possible for their supporters to succeed in electing them. Far from being a legitimate state interest that can be weighed against an infringement of constitutional rights, such state favoritism is sufficient in itself to condemn ballot access term limits to unconstitutionality.

Ballot access restrictions have been upheld to *facilitate* the ability of the majority of voters to elect their officials freely, not to manipulate election outcomes in the direction favored by the state. For example, in *Storer v. Brown*, 415 U.S. 724 (1974), a prohibition of independent candidacies by individuals who had recently been party members and thus could have sought nomination in a party primary was upheld. The prohibition furthered a legitimate state policy

to have contending forces within the party employ the primary campaign and primary election to finally settle their differences. The general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds.

415 U.S. at 735. As we have seen in Part II of this Argument, ballot access term limits undermine this policy and thereby frustrate the ability of a majority of voters to elect a candidate, by coercing members of the same party to oppose each other in the general election.

In other cases, the Court has upheld ballot access requirements reasonably designed to assure that only

serious parties and candidates with some modicum of electoral support will appear on the ballot. E.g., *American Party of Texas v. White*, 415 U.S. 767 (1974). As the Court explained in *Lubin v. Panish*, 415 U.S. 709, 715 (1974):

That "laundry list" ballots discourage voter participation and confuse and frustrate those who do participate is too obvious to call for extended discussion. The means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support is not.

It would be perverse to suggest that because the state may exclude candidates who lack voter support, it may also exclude candidates it fears will enjoy *too much* voter support. It is scarcely imaginable that this Court would rule that the state's desire to assure that certain candidates are defeated could provide a justification for denying ballot access. None of the ballot access decisions comes close to doing so. To the contrary, the touchstone in the ballot access cases has been that the will of the voters should prevail.

The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance.

Lubin v. Panish, 415 U.S. at 716.

The unconstitutionality of Arkansas' resulted-oriented ballot exclusion is highlighted by the holdings of several courts. These holdings conclude that lack of neutrality in the relatively trivial matter of *ordering* the names of parties or candidates on the ballot is prohibited by the Equal Protection Clause. E.g., *McLain v. Meier*, 637 F.2d 1159, 1165-67 (8th Cir. 1980); *Sangmeister v. Woodard*, 565 F.2d 460 (7th Cir. 1977); *Gould v. Grubb*, 14 Cal.3d 661, 122 Cal.Rptr. 377, 536 P.2d 1337 (1975).

¹⁹ These decisions are based on the constitutional requirement that the state's ballot must be "neutral in character." *Sangmeister*, 565 F.2d at 468. As one court wrote in this context:

The Fourteenth Amendment requires all candidates, newcomers and incumbents alike, to be treated equally.

Mann v. Powell, 333 F.Supp. 1261 (N.D.Ill. 1969). This statement is self-evidently true, and it is dispositive of the present case.

¹⁹ There are some decisions to the contrary, but their analysis does not lend support to Arkansas' ballot access term limits. For example, in *Clough v. Guzzi*, 416 F.Supp. 1057 (D.Mass. 1976), the listing of incumbents first was upheld, because strict scrutiny should be reserved for voting cases involving "more clear-cut and certain cases of inequality," *id.* at 1067, and because the listing of the incumbent first could be justified as an "informational device," making it clear to voters who was the candidate running for reelection. *Id.* at 1068. Excluding candidates altogether from the ballot is a "clear-cut and certain" case of inequality if ever there was one. Furthermore, to exclude a candidate from the ballot is to withhold information from the voters, not to provide it. See also *Ulland v. Growe*, 262 N.W.2d 412 (Minn. 1978), upholding the placing of independent candidates after party candidates, and relying on *Clough*.

The State of Arkansas claims that it may deny access to the ballot to selected candidates "to offset what are sometimes said to be insurmountable advantages held by incumbents in order to promote frequent rotation in office of elected officials. . . ." Pet. in No. 93-1828, at 22 n.32. With respect to its own officials, Arkansas can and does assure rotation in office by imposing absolute term limits. But Section 3 of Amendment 73 is based on the (accurate) premise that the qualifications for Congress are fixed by the Constitution. So long as term-limited individuals have the right to run for and be elected to Congress, voters supporting such individuals have the right to cast their votes free from palpable discrimination by the state.

Can the state avoid the charge of discrimination on the ground that it is simply offsetting "what are sometimes said to be insurmountable advantages held by incumbents"?²⁰ Certainly not, for several reasons.

First, the Arkansas attorney general declines to specify what those "insurmountable advantages" are. This is important, beyond the obvious point that fundamental First and Fourteenth Amendment rights cannot be overridden on the basis of such vague and unsubstantiated assertions.²¹ The notion that the state may restrict rights in order to offset electoral advantages must

²⁰ Neither Amendment 73 nor California Elections Code § 25003 limits its discrimination to incumbents. We shall put this point aside, however, because the interests and constitutional rights the California Amici seek to protect in this brief would be damaged even if the discrimination were limited to incumbents.

²¹ The term "insurmountable" is plainly hyperbolic. For example, in 1992, nineteen incumbent members of the House were defeated in primaries alone, the highest number in the post-World War II period. See *Vital Statistics on American Politics* 206 (Table 7-5) (4th ed. 1994).

at least rest on the premise that the advantages in question are pathological. But this is a false premise for some of the advantages of incumbency. In particular, the greatest advantage for incumbents might be that constituents tend to reward them with votes for trying hard to do what the constituents want them to do. Since some portion of the "incumbency advantage" may thus reflect values as basic as democratic accountability, the mere desire to eliminate electoral advantage cannot justify infringing basic constitutional rights.

Insofar as some candidates are excluded from the ballot to offset such non-pathological advantages, the exclusion is plainly unconstitutional. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others," this Court has declared, "is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). Surely it is at least as foreign to the Constitution to enhance the electoral prospects of some candidates for Congress by restricting access to the ballot for candidates the state fears may enjoy too much electoral support. The state has no business "handicapping" candidates. If voter preferences are predictable, whether on the basis of party or incumbency or ideology, the state has no legitimate interest in confounding those preferences by handicapping candidates.

Second, the state may respond that some of the "insurmountable advantages" enjoyed by incumbents are pathological and therefore deserve to be offset by exclusion from the ballot. The usual claim is that the "perquisites" of incumbent members of Congress give them an unfair advantage. Whether or not such perquisites are unfair, there is little or no evidence that they have a

significant electoral effect.²² If there were such evidence and if the state had a sincere desire to offset "unfair" advantages, it could do so by nonrestrictive means, such as providing resources to assist all qualified candidates and parties in communicating with voters. But the reality is that ballot access term limits have neither the purpose nor the effect of "offsetting" electoral advantages. If they did, there would be an effort to calibrate the handicap to the advantage. Instead, by any plausible estimate, the handicap vastly exceeds the

²² See, e.g., Morris P. Fiorina, *Congress: Keystone of the Washington Establishment* 19-23 (1st ed. 1977); John C. McAdams & John R. Johannes, "Congressmen, Perquisites, and Elections," 50 *Journal of Politics* 412 (1988). One reason for skepticism is that the surge in congressional "perqs" occurred in the 1970's, after the surge in the incumbency vote advantage of the 1960's. See Gary C. Jacobson, *The Politics of Congressional Elections* 42 (1987); Glenn R. Parker, "Members of Congress and their Constituents: The Home-Style Connection," in *Congress Reconsidered* 171, 186-89 (Lawrence C. Dodd & Bruce I. Oppenheimer, eds., 4th ed. 1989). In the 1980's there was another surge in the incumbency vote advantage, while growth in perqs was declining. See Gary C. Jacobson, *The Electoral Origins of Divided Government: Competition in U.S. House Elections* 45 (1990).

Another supposedly "unfair" practice that is often blamed for the incumbency advantage is redistricting. See, e.g., Lee Atwater, "Altered States: Redistricting Law and Politics in the 1990s," 6 *Journal of Law & Politics* 661 (1990). The empirical support for redistricting as a cause is even weaker than the support for perquisites. See, e.g., Jacobson, *Electoral Origins*, *supra*, at 96; John A. Ferejohn, "On the Decline of Competition in Congressional Elections," 71 *American Political Science Review* 166, 167-68 (1977). In any event, Arkansas can hardly justify infringing constitutional rights as a necessary means of offsetting the effects of district lines for which it is responsible.

incumbency advantage.²³ The state's purpose in imposing ballot access term limits is to assure that any affected individual with the temerity to seek election to Congress is defeated. Talk of "offsetting advantages" is a sham.

Third, and most importantly, the state has no business regulating ballot access to influence the outcome of elections. All candidates enter the race with numerous advantages and disadvantages. Candidates may have an advantage because they are wealthy, or good looking, or well-known athletes, or shrewd political operators, or especially articulate, or descended from a well-known family, or possessed of stamina that permits them to walk door to door ten hours a day without tiring. Some

²³ Quantifying the incumbency electoral advantage is a more complex venture than might seem likely at first blush, but estimates by political scientists for the post-1960s period tend to fall between seven and ten percent. See, e.g., James L. Payne, "The Personal Electoral Advantage of House Incumbents, 1936-1976," 8 *American Politics Quarterly* 465, 472 (1980) (7.2%); Andrew Gelman & Gary King, "Estimating Incumbency Advantage without Bias," 34 *American Journal of Political Science* 1142 (1990) (advantage oscillates around 10%, with considerable variance). It must be recalled that certainly not all and possibly almost none of the incumbency advantage is attributable to causes that can plausibly be regarded as unfair.

We know of no social scientific evidence quantifying the electoral disadvantage of being excluded from the ballot and forced to rely on write-in votes, but there can be little doubt that the disadvantage greatly exceeds ten percent, which forms the high-end estimate for the total electoral advantage of incumbency. The enormous electoral effect of exclusion from the ballot is the premise that underlies all of this Court's ballot access cases and was made explicit in *Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974): "The realities of the electoral process . . . strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot."

of these advantages may be fair and others may be unfair. But under the American constitutional system, all the candidates who are qualified to hold the office they seek and who can demonstrate a modicum of electoral support are entitled to appear on the ballot. It is the people, not the state, who make the final decision.

CONCLUSION

The main focus of this litigation has been whether the ballot access term limits adopted in Arkansas are invalid by reason of the Qualifications Clauses of the Constitution. The purpose of this amicus brief has been to demonstrate that although the Qualifications Clauses may be sufficient to invalidate ballot access term limits, they are by no means necessary.

The general leeway that states have to set qualifications for office cannot blithely be extended to permit states to discriminate among candidates who possess the requisite qualifications. If Amendment 73 and its counterparts in other states are taken seriously as ballot access restrictions rather than as qualifications, then this brief has shown that they represent an extreme and entirely unprecedented invasion of the most basic democratic rights of parties, candidates, and voters.

It has been shown that ballot access term limits not only prohibit parties and party voters from nominating the candidates of their choice, but that such limits radically undermine the coordinating function served by primary elections, thereby imposing on parties serious and systematically repeated schisms. It has also been shown that ballot access term limits represent the first time — and one may hope the last time — that this Court has been confronted with ballot exclusions adopted

expressly for the purpose of "handicapping" qualified candidates that the state believes should not be elected.

Although it may be unnecessary for the Court to reach the question, it would be a grave mistake for the Court to regard the First and Fourteenth Amendments as make-weights in this case. Amendment 73 is unconstitutional.

DATED: October 14, 1994.

Respectfully submitted,

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CALIFORNIA ELECTIONS CODE § 25003

§ 25003. Limitation on ballot access

(a) Federal legislative candidates, ballot access. Notwithstanding any other provision of law, the Secretary of State or other election official shall not accept or write the signatures on any ballot for any federal legislative candidate who is not on the list of qualified candidates for that office as published by the Secretary of State.

(b) Federal executive candidates, ballot access. Notwithstanding any other provision of law, the Secretary of State or other election official shall not accept or write the signatures on any ballot for any federal executive candidate who is not on the list of qualified candidates for that office as published by the Secretary of State.

APPENDIX A

(c) State legislative candidates, ballot access. Notwithstanding any other provision of law, the Secretary of State or other election official shall not accept or write the signatures on any ballot for any state legislative candidate who is not on the list of qualified candidates for that office as published by the Secretary of State.

(d) State executive candidates, ballot access. Notwithstanding any other provision of law, the Secretary of State or other election official shall not accept or write the signatures on any ballot for any state executive candidate who is not on the list of qualified candidates for that office as published by the Secretary of State.

CALIFORNIA ELECTIONS CODE § 25003

§ 25003. Limitation on ballot access

(a) Federal legislative candidates; ballot access. Notwithstanding any other provision of law, the Secretary of State, or other election official authorized by law, shall not accept or verify the signatures on any nomination paper for any person, nor shall he or she certify or place on the list of certified candidates, nor print or cause to be printed on any ballot, ballot pamphlet, sample ballot, or ballot label the name of any person, who does either of the following:

(1) Seeks to become a candidate for a seat in the United States House of Representatives, and who, by the end of the then current term of office will have served, or but for resignation would have served, as a member of the United States House of Representatives representing any portion or district of the State of California during six or more of the previous eleven years;

(2) Seeks to become a candidate for a seat in the United States Senate, and who, by the end of the then current term of office will have served, or but for resignation would have served, as a member of the United States Senate representing the State of California during twelve or more of the previous seventeen years.

(b) "Write-in" candidacies. Nothing in this section shall be construed as preventing or prohibiting any qualified voter of this state from casting a ballot for any person by writing the name of that person on the ballot, or from having such a ballot counted or tabulated, nor shall any provision of this section be construed as preventing or prohibiting any person from standing or campaigning for any elective office by means of a "write-in" campaign.

(c) Construction. Nothing in this section shall be construed as preventing or prohibiting the name of any person from appearing on the ballot at any direct primary or general election unless that person is specifically prohibited from doing so by the provisions of subdivision (a), and to that end the provisions of subdivision (a) shall be strictly construed.

(Added by Initiative Measure (Prop. 164, approved Nov. 3, 1992, eff. Jan. 1, 1993).)

APPENDIX B

OPEN CANDIDATES STATUS

WHEREAS, the California Democratic Party and its members — registered Democrats in the State of California — are determined to protect their right in primary elections to freely nominate any candidate of their choice who is a Democrat and who meets the legal qualifications for the office in question; and

WHEREAS, Propositions 140 and 164 purport to preclude the California Secretary of State from accepting the candidacy papers for both houses of Congress and the State Legislature based on previous service of specified length in the respective offices; and

WHEREAS, Proposition 164 would seriously impair the right of registered California Democrats independently to evaluate the qualifications of all candidates and to nominate the candidate of their choice;

THEREFORE BE IT RESOLVED, that the California Democratic Party primary elections for the offices of United States Representative and United States Senator are open to any candidate who meets the valid legal qualifications for these offices and who has been a registered member of the Democratic Party for the time period selected in the primary election shall be the Democratic Party's candidate on the general election ballot without discrimination on the basis of past service in office;

AND BE IT FURTHER RESOLVED, that the California Democratic Party asserts its right and desire to nominate candidates for the California State Legislature without discrimination on the basis of past service in office.

OCT 17 1994

OFFICE OF THE CLERK

Nos. 93-1456 and 93-1828

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

U.S. TERM LIMITS, INC., *et al.*,
Petitioners,
v.
RAY THORNTON, *et al.*,
Respondents.

STATE OF ARKANSAS EX REL. WINSTON BRYANT,
ATTORNEY GENERAL OF THE STATE OF ARKANSAS,
Petitioner,

v.
BOBBIE E. HILL, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES,
THE LEAGUE OF WOMEN VOTERS EDUCATION FUND, THE LEAGUE OF
WOMEN VOTERS OF WASHINGTON AND MARGARET COLONY,
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI.....	1
STATEMENT	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE VOTERS' FREEDOM TO CHOOSE FEDERAL LEGISLATORS MUST NOT BE ABRIDGED BY STATE LAWS THAT EFFECTIVELY PREVENT QUALIFIED CANDIDATES FROM BEING ELECTED.....	4
A. <i>Powell v. McCormack</i> Affirms the Importance of the Right to Freely Choose Representatives.....	5
B. The Framers Rejected Term Limits in Order to Preserve Voter Choice	6
II. AMENDMENT 73 IS A QUALIFICATION, NOT A BALLOT ACCESS REGULATION	11

A.	The Intended and Probable Effect of the Law is to Impose a Term Limit Qualification	11
B.	The Court's Ballot Access Decisions Show that the Law is a Qualification, Not a Manner Regulation	16
III.	AMENDMENT 73 VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS	20
A.	Amendment 73 is Subject to Strict Scrutiny	20
B.	Amendment 73 Violates the Right to Vote Freely and Effectively	20
C.	Amendment 73 Violates the Right to Equal Protection	24
D.	Decisions Upholding Term Limits on State Officials Are Not Applicable	26
E.	Amendment 73 Violates the Fundamental Associational Rights of Voters Exercised Directly or through Political Parties	27
	CONCLUSION	30

TABLE OF AUTHORITIES

<i>Cases:</i>	<i>Page</i>
<i>American Party of Texas v. White</i> , 415 U.S. 767 (1974)	17, 18
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	13, 18, 22, 27
<i>Bullock v. Carter</i> , 405 U.S. 134 (1972)	18, 20, 24
<i>Burdick v. Takushi</i> , 112 S.Ct. 2059 (1992)	13, 18, 20, 22, 23
<i>Democratic Party of United States v.</i> <i>Wisconsin</i> , 450 U.S. 107 (1981)	28
<i>Eu v. San Francisco County</i> <i>Democratic Cent. Committee</i> , 489 U.S. 214 (1989)	27, 28, 29, 30
<i>Frost & Frost Trucking Co. v.</i> <i>Railroad Comm'n of California</i> , 271 U.S. 583 (1926)	14
<i>Illinois State Bd. of Elections v.</i> <i>Socialist Workers Party</i> , 440 U.S. 173 (1979)	18, 20
<i>Jenness v. Fortson</i> , 403 U.S. 431 (1971)	13, 14, 17
<i>Lubin v. Panish</i> , 415 U.S. 709 (1974)	13, 18, 23, 25, 27
<i>Munro v. Socialist Workers Party</i> , 479 U.S. 189 (1986)	17
<i>Norman v. Reed</i> , 112 S.Ct. 698 (1992)	18

<i>Powell v. McCormack</i> , 395 U.S. 486 (1969).....	4, 5, 8, 10, 15
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	21, 25
<i>Storer v. Brown</i> , 415 U.S. 724 (1974).....	13, 17, 18
<i>Tashjian v. Republican Party of Conneticut</i> , 479 U.S. 208 (1986)	18, 28, 29, 30
<i>Thorsted v. Gregoire</i> , 841 F. Supp. 1068 (W.D. Wash. 1994), <i>appeal pending sub nom. Thorsted v. Munro</i> , Nos. 94-35222 et al. (9th Cir.), <i>cert. denied sub nom. Citizens for Term Limits v. Foley</i> , 114 S.Ct. 2727 (1994)	2, 5, 12, 13, 14, 15, 17 18, 19, 24
<i>U.S. Term Limits v. Hill</i> , 316 Ark. 251, 872 S.W.2d 349 (1994).....	12, 13, 14, 15
<i>Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.</i> , 425 U.S. 748 (1976)	22
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968).....	18, 20, 21

Constitutional Provisions:

U.S. Constitution, Article I, § 2	<i>passim</i>
Article I, § 3	<i>passim</i>
Article I, § 4	11, 17
Amendment I	2, 4, 20, 24 26, 27, 30

Amendment XIV.....	2, 4, 20, 24 26, 27, 30
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Ark. Constitution, Amend. 73	<i>passim</i>
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State Statutes:

Ark. Code Ann. § 7-1-101	3, 12
Ark. Code Ann. § 7-3-107	3, 12
Ark. Code Ann. § 7-5-203	29
Ark. Code Ann. § 7-5-206	29
Ark. Code Ann. § 7-5-207	3
Ark. Code Ann. § 7-5-525	3, 12
Ark. Code Ann. § 7-7-102	3, 12
Wash. Rev. Code § 29.04.180.....	29
Wash. Rev. Code § 29.15.150	29
Wash. Rev. Code § 29.18.150.....	29
Wash. Rev. Code § 29.18.160	29
Wash. Rev. Code § 29.27.020.....	29
Wash. Rev. Code § 29.42.010.....	29
Wash. Rev. Code § 29.80.010.....	29
Wash. Rev. Code § 29.80.020.....	29
Wash. Laws 1993, Ch.1, § 1 (7)	11, 12

Miscellaneous:

Articles of Confederation, Art. V (1777).....	7
2 <i>The Debates in the Several State Conventions on the Adoption of the Federal Constitution</i> (Jonathan Elliot 2d ed. 1836)	6, 9, 10
3 <i>The Debates in the Several State Conventions on the Adoption of the Federal Constitution</i> (Jonathan Elliot 2d ed. 1836)	10
Troy Eid & Jim Kolbe, <i>The New Anti- Federalism: The Constitutionality of State-Imposed Term Limits on Congressional Terms of Office</i> , 69 Denv. U. L. Rev. 1 (1992)	9
1 <i>The Records of the Federal Convention of 1787</i> (Max Farrand rev. ed. 1966).....	7, 8
2 <i>The Records of the Federal Convention of 1787</i> (Max Farrand rev. ed. 1966).....	8
<i>The Federalist</i> (Clinton Rossiter ed. 1961).....	8, 9, 10, 16
Gordon S. Wood, <i>The Creation of the American Republic, 1776-1787</i> (1969)	7

INTEREST OF THE AMICI CURIAE¹

The Amici are non-partisan organizations dedicated since their founding to preserving and protecting the rights of all citizens to exercise the franchise fully, freely and effectively.

The League of Women Voters of the United States (LWVUS) has more than 150,000 members and supporters, with Leagues in every state and virtually every congressional district in the United States. As a non-partisan, community-based, political organization, the LWVUS encourages informed and active participation of citizens in government and influences public policy through education and advocacy. The League was founded in 1920 as an outgrowth of the 72-year struggle to win voting rights for women in the United States. Protecting and enhancing the voting rights of all American citizens has been a central focus of the organization since its inception.

The LWVUS has consistently opposed term limits such as those imposed by Arkansas Amendment 73 because term limits violate the most fundamental of all rights in a democracy, the constitutional right of citizens to choose their governmental representatives. Amendment 73 and the term limit laws enacted thus far in fourteen other states will deprive thousands of League members and supporters of their voting and associational rights, undermining one of the central purposes of the League of Women Voters.

¹The consent of the parties to the filing of this brief has been filed with the Clerk of the Court.

The League of Women Voters Education Fund (LWVEF) is a non-profit, charitable, educational organization that encourages informed and active participation of citizens in government. Founded in 1957, the LWVEF provides the public as well as local and state Leagues with balanced information and opportunities for examination of election and public policy issues. The LWVEF has long worked to empower citizens through voting.

The League of Women Voters of Washington and Margaret Colony, its past president, are plaintiffs/appellees in an action challenging the constitutionality of Washington state's term limits law. *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994), *appeal pending sub nom. Thorsted v. Munro*, Nos. 94-35222 *et al.* (9th Cir. 1994). The Washington law, Initiative Measure 573, is substantially the same as Amendment 73, and imposes identical burdens on voters, candidates, and political parties. In *Thorsted v. Gregoire*, Judge William L. Dwyer of the Western District of Washington held that the Washington term limits law violated Article I, Sections 2 and 3 of the Constitution, and the First and Fourteenth Amendments. Judge Dwyer's well-reasoned decision is directly applicable to the constitutional questions present in these cases.

STATEMENT

Arkansas Amendment 73 limits the terms of members of Congress by disqualifying multi-term incumbents from the general election ballot. The law's purpose is clearly stated in

its preamble: "Therefore, the people of Arkansas, exercising their reserved powers, ***herein limit the terms of the elected officials.***" (emphasis added). The title of the law further bespeaks its purpose: "Arkansas Term Limitation Amendment."

To ensure that multi-term incumbents do not win reelection, Amendment 73 requires citizens who wish to vote for such incumbents to write-in their votes in the general election. § 3.² Multi-term incumbents are barred from being candidates in the primary election, and citizens may not vote for such incumbents in the primary, even by write-in. § 3.³ In sum, there is nothing a voter can do to place the disqualified incumbent on the primary or general election ballot, and under no circumstance may the barred incumbent candidate gain the nomination of his or her party, nor a position on the election ballot, no matter how great his or her support among the voters.

SUMMARY OF THE ARGUMENT

The right of voters to elect to Congress representatives of their choice is a fundamental issue at stake in these cases. The prohibitions of Arkansas Amendment 73

²Section 3 of Amendment 73 prohibits certification of the incumbent candidate and bars their appearance on the ballot. Ark. Code Ann. § 7-5-207 provides that election ballots "shall not contain the name of any candidate or person who has not been certified."

³Ark. Code Ann., §§ 7-1-101 (2); 7-3-107 (1); 7-7-102; § 7-5-525.

are intended to prevent and will have the effect of preventing citizens from re-electing their incumbent legislators. Such restrictions on the freedom to choose governmental representatives violate the Constitution.

The Qualifications Clauses of the Constitution safeguard the "indisputable right [of the people] to return whom they thought proper" to the Congress. *Powell v. McCormack*, 395 U.S. 486, 535 (1969), quoting 16 Parl.Hist.Eng. 589 (1769). The prohibitions of Amendment 73 violate the freedom of voter choice embodied in the Qualifications Clauses, the First and Fourteenth Amendments' protection of the right to vote freely, effectively and on an equal basis with other citizens, and the right of voters to engage in political association.

ARGUMENT

I. THE VOTERS' FREEDOM TO CHOOSE FEDERAL LEGISLATORS MUST NOT BE ABRIDGED BY STATE LAWS THAT EFFECTIVELY PREVENT QUALIFIED CANDIDATES FROM BEING ELECTED.

The Court's opinion in *Powell v. McCormack* and the briefs of respondents demonstrate that the qualifications fixed in Article I, Sections 2 and 3 of the Constitution are exclusive and unalterable by any state. The historical precedents marshalled by *Powell* further demonstrate that the premise of exclusive qualifications is the freedom of citizens to elect legislators of their choosing. When a state seeks to burden exercise of the franchise in order to prevent certain disfavored

candidates from winning re-election, it violates the enduring principle undergirding the Qualifications Clauses.

A. *Powell* Affirms the Importance of the Right to Freely Choose Representatives.

As shown in *Powell*, the Framers' purpose in adopting an exclusive list of qualifications for election to Congress was to protect the "indisputable right [of the people] to return whom they thought proper" to the Congress. *Id.* This principle forms the core of *Powell's* holding, and is the basis of the *Thorsted* court's decision striking down the Washington term limits law. 395 U.S. 486, 547; 841 F. Supp. 1068, 1077-78. *Powell* repeatedly emphasizes this point:

A fundamental principle of our representative democracy is, in Hamilton's words, "that the people should choose whom they please to govern them." 2 Elliot's Debates 257. As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself.

395 U.S. at 547;

"That the right of the electors to be represented by [citizens] of their own choice, was so essential for the preservation of all their other rights, that it ought to be considered as one of the most sacred parts of our [English] constitution."

395 U.S. at 534 n. 65, quoting 16 Parl.Hist.Eng. 589-90 (1769).

"Under these reasonable limitations [of Article I], the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty, wealth, or to any particular professional or religious faith."

395 U.S. at 540 n. 74, *quoting* Madison, *The Federalist Papers* 326 (Mentor ed. 1961).

"[T]he true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed."

395 U.S. at 540-41, *quoting* Hamilton, 2 *Debates on the Federal Constitution* 257 (J. Elliot ed. 1876) (hereinafter cited as "Elliot's Debates").

Powell shows that the "bitter struggle for the right to freely choose representatives," 395 U.S. at 532, was resolved in favor of voter choice. The voters' freedom to elect and re-elect whom they thought proper is protected from usurpation by the states or Congress by the exclusive and unalterable qualifications of Article I.

B. The Framers Rejected Term Limits in Order to Preserve Voter Choice.

As shown in the briefs of respondents, the Framers specifically considered and rejected term limits for Congress

and the Presidency. The deliberate decision of the Framers to exclude term limits entirely from the constitutional scheme was based on the principle that citizens should be able to re-elect their representatives. The Framers achieved this principle through the twin concepts of exclusivity and uniformity of the Qualifications Clauses. The arguments raised by petitioners in support of Amendment 73 are virtually identical to the failed arguments of the Anti-Federalists over two hundred years ago.

Term limits, or "rotation in office" (as term limits were then and are now sometimes named), pre-date the Constitutional Convention of 1787. A number of states imposed term limits on their legislators, and term limits were adopted in the earlier Articles of Confederation. Delegates to the Confederation Congress were limited to service of "three years in any term of six years." Articles of Confederation, Art. V, ¶ 2 (1777). By 1787, however, these efforts at rotation in office were widely seen as a failure.⁴

At the Constitutional Convention in 1787, term limits were proposed for members of Congress and rejected. The Virginia Plan, which set the terms of debate for the Convention, proposed that members of Congress would "be incapable of re-election for the space of ____ [sic] after the expiration of their term of service [.]"¹ *The Records of the Federal Convention of 1787* at 20 (M. Farrand ed. 1966).

⁴See Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1969) at 140-41, 398-99, 436-38, 477.

The number of years prior to re-eligibility for Congressional office was left blank. Fourteen days after the term limitation was proposed, the delegates voted unanimously to reject it, and deleted it from the Plan. *Id.* at 210, 217. A one-term limit on the Presidency was also proposed, and, after considerable debate, was struck from the Plan. *Id.* at 226, 230; 2 *Records of the Federal Convention* at 100-03, 119-21, 497-502, 522-25.

At the convention debates, the Framers sought to ensure that the qualifications for elected federal officials would be uniform and fixed in the Constitution. These twin principles of exclusivity and uniformity, both of which are rooted in the idea of voter freedom, informed the debates throughout. The strength and evident wisdom of these tenets prevented further qualifications from being added to the exclusive list, and triumphed over any notions of allowing Congress or the states any discretionary power to establish additional, and potentially non-uniform, qualifications. *Powell* emphasizes the importance the Framers placed on these fundamental principles. 395 U.S. at 534, 539-41, 547-48.

As Madison stated in *The Federalist No. 52*,

The qualifications of the elected . . . being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention Under these reasonable limitations, the door of this part of the federal government is open to merit of every description[.]

The Federalist Papers No. 52 at 326 (C. Rossiter ed. 1961).

The Constitution's exclusion of term limits was one basis on which the Anti-Federalists opposed ratification, complaining that "[r]otation, that noble prerogative of liberty, is *entirely excluded from the new system of government* and the great men may and probably will be continued in office during their lives."⁵ Elbridge Gerry of Massachusetts, a leading Anti-Federalist, condemned the proposed Constitution for its omission of term limits for members of Congress, complaining that nothing would prevent "the perpetuity of office in the same hands for life." *Id.* at 14-15 & n. 81.

The Framers' successful opposition to term limits and other qualifications beyond those listed in Article I was based, however, on a different and more viable notion of "liberty" - namely, the principle of voter choice. At the New York convention, Robert Livingstone reiterated this fundamental principle:

"The people are the best judges [of] who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights."

Powell, 395 U.S. at 541 n. 76, *quoting* 2 Elliot's Debates 292-93.

⁵Troy Eid & Jim Kolbe, *The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office*, 69 Denv. U. L. Rev. 1, 16 & n. 82 (1992)(Letter by an Officer of the Late Continental Army, Nov. 3, 1787).

Livingstone attacked term limits as "an absurd species of ostracism--a mode of proscribing eminent merit, and banishing from stations of trust those who have filled them with the greatest faithfulness." 2 Elliot's Debates 293.

Wilson Carey Nicholas rebutted the Anti-Federalists' attempts to add qualifications on the same grounds:

"It has ever been considered a great security to liberty, that very few should be excluded from the right of being chosen to the legislature. This Constitution has amply attended to this idea. We find no qualifications required except those of age and residence, which create a certainty of their judgment being matured, and of being attached to their state."

Powell, 395 U.S. at 541, *quoting* 3 Elliot's Debates 8.

Rather than deprive voters of the right to re-elect incumbent legislators by imposing mandatory rotation, the Framers chose to rely on frequent elections to check the power of incumbent legislators. *See, The Federalist No. 52* at 327; *The Federalist No. 57* at 352.

The treatment of term limits by the Constitutional Convention and during the ratification debates demonstrates that the Founders considered and conclusively rejected the concept, that the fundamental reason for doing so was to preserve for citizens the highest degree of freedom to choose their federal governmental representatives, and that their means for assuring that freedom was through the Qualifications Clauses, Article I, Section 2 and 3.

II. AMENDMENT 73 IS A QUALIFICATION, NOT A BALLOT ACCESS REGULATION.

Petitioners contend that Amendment 73 does not in fact impose a term limit qualification in violation of the Qualifications Clauses, but is instead a reasonable ballot access regulation under Article I, Section 4, the Times, Places and Manner Clause. This argument is refuted by the text and operation of Amendment 73, which shows that the intent and probable effect of the law is to prevent voters from re-electing disfavored incumbents. Petitioners' argument is also refuted by the ballot access decisions of this Court, which have consistently upheld the rights of voters to choose their representatives.

A. The Intended and Probable Effect of the Law is to Impose a Term Limit Qualification.

Amendment 73 is a qualification because it singles out and bans from the ballot a class of constitutionally qualified candidates in an express attempt to prevent their re-election. This is not a legitimate ballot access objective. A law which seeks to deny voters the freedom to return an incumbent legislator to Congress is not regulation of the times, nor the places, nor the manner of an election.

Amendment 73 forthrightly states its purpose in its preamble: "the people of Arkansas . . . herein limit the terms of the elected officials."⁶ Amendment 73 limits terms of

⁶This unambiguous statement of purpose is similar to that expressed in the Washington term limits law: "The people of

incumbents by diminishing the voting rights of those citizens who would re-elect them--relegating such voters to a write-in process in the general election.

In the primary election, the franchise is denied outright: under Amendment 73 and the Arkansas election code, write-in votes in a primary are not counted, and the incumbent cannot be certified for any election. § 3; Ark. Code Ann. § 7-5-525. Nor may the disqualified incumbent be nominated by his or her political party. Ark. Code Ann. §§ 7-1-101(2); 7-3-107(1); 7-7-102. The multi-term incumbent cannot win a place on the ballot under any circumstances, regardless of what the voters wish or do.

Petitioners argue that the law's allowance of limited write-in voting preserves enough voter choice to save Amendment 73 from the jaws of the Qualifications Clauses. This argument exalts form over substance.

The write-in "option" of Amendment 73 (and an almost identical provision in the Washington term limits law) is properly characterized as a faint "glimmer of opportunity" by the court below, P.C.A. 15a, or as a "pinhole of opportunity" by the *Thorsted* court, 841 F. Supp. at 1079. Neither the court below nor the *Thorsted* court accepted the ruse of ballot access phrasing; both arrived at the common-sense conclusion that "[d]enial of ballot access ordinarily

Washington have a compelling interest in preventing the self-perpetuating monopoly of elective office by a dynastic ruling class." Washington Laws 1993, Ch.1, § 7 (7).

means unelectability." *Thorsted*, 841 F. Supp. at 1081.⁷ Both courts acknowledged the "realities of the election process" cited by *Anderson v. Celebrezze*, 460 U.S. 780 (1983), where this Court similarly concluded that write-in voting is not an adequate substitute for having the candidate's name appear on the ballot. *Id.* at 799-800 n. 26.⁸

Petitioners cite *Storer v. Brown*, 415 U.S. 724, 737 n. 7 (1974) and *Jenness v. Fortson*, 403 U.S. 431, 438 (1971) as evidence of this Court's tolerance of ballot disqualification so long as a write-in opportunity is preserved. To the contrary, the Court in these cases merely noted that a write-in option was yet one more route available to the affected candidates. *Id.* In both cases, the candidate could win a place on the ballot if he or she disaffiliated from a political party (*Storer*) or met a five percent petition requirement

⁷Petitioner U.S. Term Limits ("USTL") argues that the court's conclusion in *Thorsted* that the write-in option in Washington's term limits law was a "pinhole of opportunity" was not supported by the record. USTL Br. at 17, n. 21. To the contrary, even USTL's own expert witness in *Thorsted* and in this case agrees that a write-in candidacy is more difficult to win than one in which a candidate's name is on the ballot, and that only five write-in candidacies in 170 years have succeeded for election to the House of Representatives. USTL Br. at 18. *Thorsted's* "pinhole of opportunity" conclusion, like the "glimmer of opportunity" conclusion of the court below, are conclusions based on common knowledge, common sense, and a record including petitioner's own evidence.

⁸See also, *Lubin v. Panish*, 415 U.S. 709, 719 n. 5 (1974); *Burdick v. Takushi*, 112 S.Ct. 2059, 2065 n. 7 (1992)("it is clear under our decisions that the availability of a write-in option would not provide an adequate remedy.").

(*Jenness*). The Court has never held or even suggested that a write-in option is an adequate remedy for a state's complete ban on ballot access to a candidate who clears all the procedural hurdles placed by the state as part of the election process.

Both the court below and the *Thorsted* court properly concluded that ballot access phrasing cannot save a measure whose plain purpose is to impose a qualification:

The [Washington] Initiative would thus have the practical effect of imposing a new qualification: non-incumbency beyond the specified periods. The intended and probable result would be the same as if the State were to adopt non-incumbency as an absolute requirement. A state may not do indirectly what the Constitution forbids it to do directly. *Frost & Frost Trucking Co. v. Railroad Com'n of California*, 271 U.S. 583, 593-94 (1926).

841 F. Supp. at 1081.

The logical extension of petitioners' ballot access argument--that a measure admittedly designed to prevent an otherwise qualified candidate from being elected to Congress can be cured of its constitutional infirmities through the inclusion of a write-in option--makes a sham of those Qualifications Clauses which the Constitutional Convention debated so earnestly.

If petitioners' argument were to be accepted, then a state could avoid the Qualifications Clauses simply by barring qualified but disfavored candidates from the ballot instead of declaring them ineligible for the office. As long as some form

write-in voting is allowed, these ballot bans would avoid constitutional scrutiny under the Qualifications Clauses.

If the ballot access device were a cure for an otherwise unconstitutional qualification, then a state could decide, for example, that it has a compelling interest in securing experienced legislators, and require candidates for Congress to have served in the state legislature before being eligible for the election ballot in a congressional race. See *Thorsted*, 841 F.Supp. at 1078-79. Or with appropriate findings, a state might enact a law barring lawyer-candidates from the ballot. In each of these cases, the state might well be able to frame a compelling reason for the ballot exclusion, but the fact remains that such "ballot access" laws, like term limits, are intended as qualifications which will deprive citizens from freely choosing who shall govern them.

Moreover, if states are allowed to "dress eligibility to stand for Congress in ballot access clothing," P.C.A. 15a, then a host of different qualifications for election to Congress could exist across the nation, depending on the current animus of each state's majority. This would mock the principle of uniformity so important to the Framers, and vest in state legislatures the "very dangerous powers of exclusion" which *Powell* explicitly denied to the Congress. *Powell*, 395 U.S. at 533-34, 540 & n. 75.

The Framers' prescient warnings about the dangers of exclusion and the need for uniformity in qualifications are well illustrated in the consequences of term limits laws, which would impose non-uniform and exclusionary term limit

qualifications on members of Congress for various durations (and on some members not at all), thereby producing the very exclusion and national inconsistency the Framers specifically sought to avoid.

Surely there is a threat to representative democracy when voters seeking to exercise the franchise are restricted to write-in voting despite that fact that the candidate for whom they are voting can meet all requirements imposed by the election process itself and is otherwise entitled to a place on the ballot. The result is that Mr. Madison's door to election, intended to be "open to merit of every description," has been closed. *The Federalist No. 52* at 326.

Amendment 73 is a term limit qualification imposed by the state in violation of Article I, Sections 2 and 3 of the Constitution.

**B. The Court's Ballot Access Decisions
Show that the Law is a Qualification,
Not a Manner Regulation.**

Petitioners' reliance on ballot access phrasing to save Amendment 73 also fails in light of this Court's consistent ballot access jurisprudence. This Court has never allowed voter choice to be subsumed by a state interest such as that expressed in Amendment 73: preventing the elections of "entrenched" incumbents who "remain in office too long." Preamble to Amendment 73.

Although the Constitution bars the states from imposing substantive restrictions on *who* may be elected to Congress, it permits reasonable state regulation of *how*

elections are conducted under the Times, Places and Manner Clause of Article I, Section 4. *Thorsted*, 841 F. Supp. at 1079. Under this Clause, the power of states to limit ballot access is confined to instances where the state has a legitimate interest in regulating the process and manner of elections.

Amendment 73 is not such a regulation. The law patently seeks to determine the outcome of an election by barring constitutionally qualified candidates from all routes to the ballot and denying voters any chance to place them on the ballot. The states have no legitimate interest in pre-determining the losers or winners of an election, nor do they have the power to do so under the Times, Places and Manner Clause. No state ballot access statute has ever been held constitutional that so patently attempts to *effect*, rather than *affect*, the results of an election.

Amici do not dispute that "as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). In *Storer*, this Court affirmed that the state has a legitimate interest in "maintaining the integrity of the various routes to the ballot." 415 U.S. at 733. The Court has upheld other state ballot access laws to combat party factionalism and to ensure that election winners are chosen by a clear majority.⁹ But this Court has

⁹See *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), *Jenness v. Fortson*, 403 U.S. 431 (1971), *American Party of Texas*

consistently invalidated unduly restrictive measures which infringe on voter choice and are neither even-handed nor generally applicable, and not designed to protect the election process itself.¹⁰

As the *Thorsted* court observed, all of the state ballot access laws upheld by this Court have one thing in common: the laws "have been open to compliance by candidates who take the necessary steps, or make the required showing, in the election process itself." 841 F. Supp. at 1081. The corollary to this truth is that the Court has never permitted the state to restrict, for the stated purpose of impeding a candidate's or a class of candidates' election, the freedom of voters to advance a candidate to a position on the ballot.

Unlike valid ballot restrictions that maintain the integrity of various routes to the ballot, Amendment 73 *closes* all routes to the ballot for the disfavored incumbent. Incumbents may affiliate or disaffiliate with political parties, fulfill any and all vote percentage requirements, clear waiting periods, satisfy early or late filing deadlines, pay filing fee requirements, meet petition requirements, and still be barred from the ballot. Multi-term incumbents cannot get on the

v. White, 415 U.S. 767 (1974), *Burdick v. Takushi*, 112 S.Ct. 2059 (1992).

¹⁰See, *Williams v. Rhodes*, 393 U.S. 23, 34 (1968); *Anderson v. Celebrezze*, 460 U.S. at 805-06; *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 187 (1979); *Lubin v. Panish*, 415 U.S. 709, 718-19; *Bullock v. Carter*, 405 U.S. 134, 149 (1972); *Tashjian v. Republican Party*, 479 U.S. 208, 229 (1986); *Norman v. Reed*, 112 S.Ct. 698 (1992).

ballot by primary victory, party nomination, independent candidacy, petitioning, or appointment.

Citizens may attempt to petition, convene, nominate, or vote for the incumbent, but their votes are not counted in the primary; their nomination cannot be certified; and there is nothing even a majority of the voters can do to place the multi-term incumbent on the ballot.

Amendment 73 in fact runs directly counter to those legitimate state interests identified in *Storer*: the Law *promotes*, instead of prevents, "splintered parties and unrestrained factionalism" by interfering with the rights of voters and political parties to nominate their chosen candidate; the Law *destabilizes* the electoral process instead of insuring the "stability of its political system," since candidates with demonstrable public support (e.g., incumbents or previous multi-term officeholders) are not allowed on the ballot; the Law *winnows out* the chosen candidate of the prior elections instead of "winnowing out all but the chosen candidates." 415 U.S. at 731-36.

As the *Thorsted* court concluded, Amendment 73 "is aimed not at achieving order and fairness in the process but at preventing a disfavored group of candidates from being elected at all." 841 F.Supp. at 1068. No ballot access case cited by petitioners has permitted a state to determine the outcome of an election by denying the choice of a majority of the electorate (e.g., in a primary) a place on the ballot in the general election. That is precisely what Amendment 73 is designed to do.

III. AMENDMENT 73 VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS.

If as petitioners assert Amendment 73 is not a qualification, it necessarily follows that the disfavored incumbents targeted by the law are fully qualified candidates. The state must therefore show that it is permissible under the First and Fourteenth Amendments to severely discriminate against fully qualified candidates.

A. Amendment 73 is Subject to Strict Scrutiny.

In deciding the constitutionality of Amendment 73, this Court must weigh the degree to which the Amendment infringes upon voting and associational rights against the state interests Amendment 73 is designed to promote. *Burdick v. Takushi*, 112 S.Ct. 2059, 2063 (1992). Restrictions on fundamental rights such as those imposed by Amendment 73 must be narrowly drawn to advance a compelling state interest. *Id.*

The right to vote is not only fundamental but is also protective of all rights and privileges under the Constitution. State efforts to impose substantial burdens upon exercise of the franchise have consistently invoked the strict scrutiny of this Court. *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968); *Bullock v. Carter*, 405 U.S. 134, 144 (1972). Amendment 73 does not survive strict scrutiny.

B. Amendment 73 Violates the Right to Vote Freely and Effectively.

This Court has often stated that "voting is of the most fundamental significance under our constitutional structure." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). In *Williams v. Rhodes*, the Court struck down an Ohio statute which burdened the same rights at issue here:

In the present situation the state laws place burdens on two different, although overlapping, kinds of rights -- the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms.

393 U.S. at 30.

Similarly, in *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court affirmed that:

The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.

Id. at 555.

The means by which Amendment 73 carries out its stated purpose of promoting rotation in office is to prevent citizens from voting in the primary election for a disqualified incumbent, and confining exercise of the franchise to write-in balloting in the general election. These severe restrictions on

the franchise plainly violate the fundamental rights of citizens to vote freely and effectively.

Amendment 73 is not narrowly drawn to advance a compelling interest. The state does not have any legitimate interest, much less a compelling one, in handicapping certain candidates because they enjoy too much support from the electorate. If the state is truly interested in "leveling the electoral playing field" so that elections are more competitive and incumbents less "entrenched," it should promote more voting, not less.¹¹ Barring popular candidates from the ballot so that voters will not return them to office is not a narrowly tailored solution to the alleged "problem" of an electorate which too often re-elects their congressional representatives.

Petitioners argue that there is no injury to voting rights since Amendment 73 allows voting, albeit by write-in, for the ballot-barred incumbent in the general election. This Court has concluded, however, that write-in voting is not an adequate substitute, *Anderson v. Celebrezze*, 460 U.S. at 799 n. 26, and that the right to cast a write-in ballot is of a sufficiently lesser constitutional dimension when compared to actual access to the ballot that it may be banned altogether where the latter is readily available. *Burdick v. Takushi*, 112 S.Ct. at 2067.

¹¹Similarly, the best means for the state to promote wise decisions by the citizenry is "to open the channels of communication rather than to close them." *Anderson v. Celebrezze*, 460 U.S. at 798, quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)

As shown, the logical extension of petitioners' argument--that write-in voting is a sufficient cure for exclusion from the ballot--would allow the state to order the results of any election through manipulation of the ballot. The right to vote is more than simply the right to cast a write-in ballot. The "realities of the election process" strongly suggest that a write-in vote for a disfavored, ballot-barred candidate is less effective, and a less meaningful exercise of the franchise, than freely choosing among qualified candidates on the ballot.

Petitioners also contend that the right to vote is not absolute, and that candidates do not have a fundamental right to a place on the ballot. It is true that the right to candidacy is not *per se* a fundamental right, and that voters may not always find their ideal candidate on the ballot. But the right to a place on the ballot is a basic constitutional freedom and is intertwined with fundamental voting rights: "[t]he right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters." *Lubin v. Panish*, 414 U.S. at 716.

Unlike the voter plaintiff in *Burdick v. Takushi*, the voters in this case do not wish to vote for "Donald Duck," nor do they assert a right to do so. 112 S.Ct. at 2065. Rather, the voters here wish to vote for qualified candidates who possess demonstrable support among the electorate.

When the state burdens candidacy rights, it necessarily burdens the rights of those who wish to vote for the disfavored candidate. The "rights of voters and the rights of

candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock v. Carter*, 405 U.S. at 143. Although petitioners may not have an absolute right to vote for every candidate of their choosing, they do have the right to vote for candidates who are not targeted by the state for defeat.

Amendment 73 is "neither neutral, nor nondiscriminatory, nor narrowly drawn . . . it seeks to determine the outcome, not the procedures." *Thorsted*, 841 F.Supp. at 1083. As held by the *Thorsted* court, term limit laws such as Amendment 73 violate the First and Fourteenth Amendments:

The state interest claimed is to prevent congressional incumbents from winning; but the Constitution places that decision with the voters in each election, not with a state government . . . [the law] hobbles a few runners to make sure they lose. A state may not constitutionally do that, just as it may not bar qualified runners from the track.

Id.

C. Amendment 73 Violates the Right to Equal Protection.

The Equal Protection Clause confers the right upon voters and the obligation upon the state to ensure that qualified voters and candidates participate on an equal basis with other voters and candidates in the electoral process.

Lubin v. Panish, 414 U.S. at 713-14. This principle "flows naturally" from the Court's recognition that

[l]egislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislators are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.

Id., quoting *Reynolds v. Sims*, 377 U.S. at 562.

Amendment 73 effectively establishes two tiers of voting rights for citizens in Arkansas: those who do not support disqualified incumbents may have their votes counted in the primary, and may choose from candidates on the ballot in both the primary and the general elections. Those who support disqualified incumbents have no opportunity to vote for them in the primary, and must write-in their votes in the general election. Although voters in this second tier can still vote, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizens vote just as effectively as by wholly prohibiting the free exercise of the franchise." 377 U.S. at 555.

If the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system, then Amendment 73 crushes that bedrock through invidious discrimination. Voters who wish to vote for an incumbent are reduced to second class citizens by Amendment 73--in the voting booth,

on a campaign trail, in the convention halls--for all forms of political action.

The state has no leeway under the First and Fourteenth Amendments to set up flagrantly discriminatory election rules for the sole purpose of favoring some candidacies, and some voters, over others.

D. Decisions Upholding Term Limits on State Officials Are Not Applicable.

Petitioners contend that Amendment 73 does not violate the First and Fourteenth Amendments because several courts, including the one below, have upheld term limits on state and local officials against such challenges.¹² These state term limit cases are inapplicable here for several reasons. First, the cases concern the plenary power of states to specify the qualifications for their own offices, not federal offices. The state has a far greater interest in regulating its own offices than it does in imposing limits on the terms of members of Congress.

Second, petitioners cannot have it both ways. The laws at issue in the state term limit cases are direct, absolute term limit qualifications. Petitioners argue that Amendment 73 is not such a term limit qualification, but a mere ballot access measure. Amendment 73 is either a qualification or not. If it is a qualification, it is unconstitutional under the Qualifications Clauses. If it is not a qualification, then petitioners must justify the law's discrimination against fully

¹²See cases cited in USTL Br. at 22-23 n. 27.

qualified candidates under the First and Fourteenth Amendments. In so doing, petitioners cannot legitimately rely on cases which concern qualifications for state offices.

E. Amendment 73 Violates the Fundamental Associational Rights of Voters Exercised Directly or through Political Parties.

In addition to violating fundamental voting rights, Amendment 73 abridges the right of citizens to engage in political association. By denying citizens the right to vote in the primary for an incumbent, and the right to associate for and nominate the candidate of their choice, Amendment 73 violates the First and Fourteenth Amendments.

Voters, after all, "can assert their preferences only through candidates or parties or both." *Lubin v. Panish*, 414 U.S. at 716. "It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his [or her] policy preferences on contemporary issues." *Id.* Excluding disfavored incumbent candidates from the ballot and from party nomination "burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens." *Anderson v. Celebrezze*, 460 U.S. at 787-88.

Freedom of association also means that a political party has the right to "identify the people who constitute the association," and to select a "standard bearer who best represents the party's ideologies and preferences." *Eu v. San Francisco County Democratic Cent. Committee*, 489 U.S.

214, 224 (1989). The Court has repeatedly held that "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 215 (1986), quoting *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981).

This Court recognizes that a central purpose of political parties is the role they play "in the process by which voters inform themselves for the exercise of the franchise." *Tashjian*, 479 U.S. at 220. Amendment 73 not only impedes this vital flow of information to voters (since the incumbent cannot run in the primary nor be nominated as the party's standard bearer), but confuses voters and precludes their identification with the candidate who represents the party and therefore constitutes the association.

For example, in a year where a Republican incumbent has been disqualified from the ballot, voters in Arkansas might be faced with three candidates in the general election; the Republican nominee, the Democratic nominee and the write-in incumbent candidate who has been the Republican nominee and standard-bearer in the past several elections.¹³

¹³The Washington term limits law similarly bars voters and political parties from nominating ballot-barred incumbents by prohibiting their declarations of candidacy. However, in Washington write-in voting is permitted in the primary election. Thus it is possible for an incumbent to win the primary election and be nominated by the voters and his or her party, only to be disqualified from the ballot and the party nomination by the term limits law. Voters in the general election could be faced with a bewildering choice of "official" party nominees and "non-official"

Under Arkansas law, disqualified incumbents are further excluded from official campaign information, such as the official announcement listing of qualified candidates for the general election. Ark. Code Ann. §§ 7-5-203, 206.¹⁴

The practical consequences of Amendment 73 thus not only plainly violate fundamental associational rights, but also play havoc with the efforts of organizations such as the League of Women Voters to educate voters and encourage their participation in the political process.

Finally, the fact that Amendment 73 wholly denies voters and political parties the right to nominate a candidate for election to Congress shows that the law is clearly unconstitutional under *Eu v. San Francisco County Democratic Cent. Committee* and *Tashjian v. Republican Party of Connecticut*. These decisions established broad protection for political parties from state regulation of their election-related activity, and affirmed the rights of voters to select nominees of their choosing without interference from the state. The basis for the party's broad immunity from state interference in their affairs and voters' freedom to choose

nominees. See Rev. Code of Wash., Chaps. 29.42.010; 29.18.150; 29.27.020; 29.15.150; 29.18.160.

¹⁴The Washington state term limits law similarly excludes the disfavored incumbent from all official notices of primary elections and the listing of candidates seeking election, and bars them from the Voters Pamphlet mailed to every registered voters home. Rev. Code of Wash., Chaps. 29.04.180; 29.80.010, 020.

derives from the fundamental importance of the associational interests at stake.

The extent of interference by Amendment 73 with the associational rights of the voters, whether directly or through political parties, well exceeds the state intrusions struck down by the Court in *Eu* and *Tashjian*. Amendment 73 so patently violates these associational rights that it is unconstitutional on this basis alone.

CONCLUSION

The freedom of voters to choose their congressional representatives is the principle that underlies the exclusive listing of qualifications in Article I and the First and Fourteenth Amendment protection of the right to vote and associate: Amendment 73 deprives voters of this freedom by disqualifying certain disfavored candidates from the ballot.

For the reasons stated, the decision of the Supreme Court of Arkansas that Arkansas Constitutional Amendment 73 violates the United States Constitution should be affirmed.

Respectfully submitted,

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**BRIEF OF AMICI CURIAE THE AMERICAN CIVIL
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TABLE OF CONTENTS

	Page
INTEREST OF AMICI.....	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	4
A. AMENDMENT 73 IMPERMISSIBLY IMPOSES QUALIFICATIONS ON CANDIDACY FOR THE UNITED STATES CONGRESS IN VIOLATION OF ARTICLE I OF THE UNITED STATES CONSTITUTION.....	4
1. Article I Establishes the Exclusive Qualifications for Congress and No State May Demand More	4
a) The Constitutional Text	4
b) The Historical Record.....	7
(1) The Constitutional Convention.....	8
(2) The Ratification Debates.....	11
c) Scholarly Commentators.....	14
d) <i>Powell v. McCormack</i>	15

e) Every Court to Have Considered the Issue Has Concluded That the Qualifications Clause Is Exclusive	16
2. The Term Limits Amendment Is an Additional Qualification for Federal Office, Not a Regulation of the Electoral Process	22
a) Restrictions Based on Personal Characteristics of Candidates Constitute Additional "Qualifications"	22
b) The Stated Purpose and Almost Certain Effect of the Term Limits Law Is to Limit Terms by Effectively Disqualifying Incumbents From Reelection	24
B. NEITHER THE NINTH NOR TENTH AMENDMENTS RESERVE POWER TO THE STATES TO ADD QUALIFICATIONS FOR FEDERAL OFFICE.....	26
C. AMENDMENT 73 CANNOT BE JUSTIFIED AS A "TIMES, PLACES, AND MANNER" REGULATION.....	26
1. The Scope of the State's Power to Regulate Federal Elections Is Not Unlimited	27

a) State Power to Regulate the "Times, Places, and Manner" of Federal Elections	27
b) State Power to Regulate State Office Holders	28
2. The Term Limits Law Is Not a Valid "Times, Places, and Manner" Regulation	28
CONCLUSION	29

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Cases

<i>Adams v. Supreme Court</i> , 502 F. Supp. 1282 (M.D. Pa. 1980)	21
<i>Alex v. County of Los Angeles</i> , 35 Cal. App. 3d 994, 111 Cal. Rptr. 285 (Cal. Dist. Ct. App. 1973)	21
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	25, 27, 29
<i>Application of Ferguson</i> , 57 Misc. 2d 1041, 294 N.Y.S.2d 174 (N.Y. Super Ct. 1968)	20
<i>Buckingham v. State</i> , 42 Del. 405, 35 A.2d 903 (1944)	19, 20
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	27
<i>Bullock v. Carter</i> , 405 U.S. 134 (1972)	25
<i>Burdick v. Takushi</i> , 112 S. Ct. 2059 (1992)	23
<i>Clements v. Fashing</i> , 457 U.S. 957 (1982)	21
<i>Danielson v. Fitzsimmons</i> , 232 Minn. 149, 44 N.W.2d 484 (1950)	19, 20
<i>Dillon v. Fiorina</i> , 340 F. Supp. 729 (D.N.M. 1972)	18, 19
<i>Ekwall v. Stadelman</i> , 146 Or. 439, 30 P.2d 1037 (1934)	17
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<i>Hellmann v. Collier</i> , 217 Md. 93, 141 A.2d 908 (1958)	15, 19
<i>In re O'Connor</i> , 173 Misc. 419, 17 N.Y.S.2d 758 (N.Y. Super. Ct. 1940)	20
<i>In re Opinion of Judges</i> , 79 S.D. 585, 116 N.W.2d 233 (1962)	19
<i>Joyner v. Mofford</i> , 706 F.2d 1523 (9th Cir.), cert. denied, 464 U.S. 1002 (1983)	21, 23, 28
<i>Legislature v. Eu</i> , 54 Cal. 3d 492, 286 Cal. Rptr. 283, 816 P.2d 1309 (1991), cert. denied, 112 S. Ct. 1292 (1992)	25
<i>Lowe v. Fowler</i> , 240 Ga. 213, 240 S.E.2d 70 (1977)	21
<i>Lubin v. Panish</i> , 415 U.S. 709 (1974)	27
<i>Miyazawa v. City of Cincinnati</i> , 825 F. Supp. 816 (S.D. Ohio 1993)	25
<i>New York v. United States</i> , 112 S. Ct. 2408 (1992)	26
<i>Nixon v. United States</i> , 113 S. Ct. 732 (1993)	4
<i>Oklahoma State Election Bd. v. Coats</i> , 610 P.2d 776 (Okla. 1980)	21

<i>Olmstead v. United States</i> , 277 U.S. 438 (1928).....	29
<i>Plugge v. McCuen</i> , 310 Ark. 654, 841 S.W.2d 139 (1992).....	19
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969).....	4, 5, 6, 7, 14, 15, 16
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	2
<i>Richardson v. Hare</i> , 381 Mich. 304, 160 N.W.2d 883 (1968).....	21
<i>Riley v. Cordell</i> , 200 Okla. 390, 194 P.2d 857 (1948).....	20
<i>Shub v. Simpson</i> , 196 Md. 177, 76 A.2d 332, appeal dismissed, 340 U.S. 881 (1950).....	19
<i>Signorelli v. Evans</i> , 637 F.2d 853 (2d Cir. 1980).....	6, 21
<i>Stack v. Adams</i> , 315 F. Supp. 1295 (N.D. Fla. 1970).....	18, 21
<i>State ex rel. Chandler v. Howell</i> , 104 Wash. 99, 175 P. 569 (1918)	17
<i>State ex rel. Chavez v. Evans</i> , 79 N.M. 578, 446 P.2d 445 (1968).....	19
<i>State ex rel. Eaton v. Schmahl</i> , 140 Minn. 219, 167 N.W. 481 (1918).....	20
<i>State ex rel. Johnson v. Crane</i> , 65 Wyo. 189, 197 P.2d 864 (1948).....	18

<i>State ex rel. Pickrell v. Senner</i> , 92 Ariz. 243, 375 P.2d 728 (1962).....	21
<i>State ex rel. Santini v. Swackhamer</i> , 90 Nev. 153, 521 P.2d 568 (1974).....	20
<i>State ex rel. Wettengel v. Zimmerman</i> , 249 Wis. 237, 24 N.W.2d 504 (1946).....	21
<i>Stockton v. McFarland</i> , 56 Ariz. 138, 106 P.2d 328 (Ariz. 1940).....	17, 20
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	13, 27
<i>Stumpf v. Lau</i> , 108 Nev. 826, 839 P.2d 120 (1992).....	19, 25
<i>Thorsted v. Gregoire</i> , 841 F. Supp. 1068 (W.D. Wash. 1994).....	19, 25
<i>Wright v. United States</i> , 302 U.S. 583 (1937).....	4
United States Constitution	
Article I, § 2	4, 22
Article I, § 3	4, 5
Article I, § 4	3, 6, 24, 27, 28, 29
Article I, § 5	6, 16, 23
Article I, § 6	5
Article IV, § 4	5
Article VI	5
Amend. XIV, § 3	5

Articles of Confederation

Arts. Confed. V (1777) 7

State Constitutions

Arkansas Const., amend. 73 (Preamble) 23, 24, 25, 29

Pa. Const., § 11 (1776) 13

Other Authorities

The Federalist No. 60 (A. Hamilton)
(Bourne ed., 1917) 11

The Federalist No. 52 (J. Madison)
(Bourne ed., 1917) 5, 12

*The Legal Qualifications of
Representatives*, 3 Am. L. Rev. 427
(1868-69) 18

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(Wilbourn E. Benton ed., 1986) 8

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Law* (3d ed. 1836) 15

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Constitution* (Philip B. Kurland &
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Constitution* (1836) 6, 13

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Constitution* (1928) 6, 7, 10, 15

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INTEREST OF *AMICI*

The American Civil Liberties Union ("ACLU") is a
nonprofit, nonpartisan organization with nearly 300,000

members nationwide, dedicated to the preservation of rights guaranteed by the United States Constitution. The American Civil Liberties Union of Washington ("ACLU-W") is one of its state affiliates. Both the ACLU and the ACLU-W have frequently appeared in this and other courts in the defense of constitutional liberties.

This case concerns issues of fundamental importance in any constitutional democracy. As Chief Justice Warren wrote, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Because of their unique perspective and history of defense of voting rights and constitutional liberties, these *amici* respectfully submit this brief in support of respondents on the merits.¹

STATEMENT OF THE CASE

This case involves a challenge to Amendment 73 to the Arkansas Constitution, adopted in November 1992 by an initiative petition. The relevant portion of the amendment provides that a person who has been elected to three or more terms to the U.S. House of Representatives, or to two or more terms to the U.S. Senate, is thereafter barred for life from appearing on the ballot for that office. Such incumbents may gain reelection only through write-in campaigns.

This lawsuit was filed in November 1992 in the Pulaski County Circuit Court. The circuit court granted summary judgment for the plaintiffs, finding the law an impermissible, state-imposed qualification for federal

¹Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

office. Pet. App. at 49a. The Arkansas Supreme Court affirmed. Pet. App. at 14a.

SUMMARY OF ARGUMENT

By imposing term limits on Members of Congress, the State of Arkansas baldly asserts a power to influence the election of federal legislators. The effort is plainly inconsistent with the text, history, and consistent judicial construction of the federal Constitution.

First, the Qualification Clauses do not authorize states to add new qualifications for federal office, and have historically been interpreted to deny such a power by implication. The qualifications of federal legislators are governed by the Constitution, and do not fall within the residual state power to regulate private conduct. By imposing ballot access restrictions on certain incumbent candidates for federal office with the express purpose, and almost certain effect, of barring reelection, Arkansas has attempted to impose an additional qualification for federal office that must be rejected.

Arkansas identifies no other source of constitutional authority that permits interference with the outcome of federal elections. The Ninth and Tenth Amendments preserve only preexisting powers of the states, and confer no new power over federal offices created by the Constitution. Nor can the term limits amendment be justified as a permissible regulation of the time, place, or manner of congressional elections. Its sole and explicit purpose is to prevent the reelection of designated congressional officeholders, an effort to control the outcome of a federal election plainly unauthorized by Article I, § 4.

Accordingly, these *amici* respectfully urge this Court to affirm the decision of the Arkansas Supreme Court.

ARGUMENT

A. AMENDMENT 73 IMPERMISSIBLY IMPOSES QUALIFICATIONS ON CANDIDACY FOR THE UNITED STATES CONGRESS IN VIOLATION OF ARTICLE I OF THE UNITED STATES CONSTITUTION

1. Article I Establishes the Exclusive Qualifications for Congress and No State May Demand More

The initial question before the Court is whether the explicit qualifications for Congress established by the Constitution are exclusive. In addressing this question, the Court must consider the constitutional text itself, the debate over the document, the historical context in which it was adopted, and the construction given the clauses by relevant authority.

This inquiry is guided by the Court's examination of these same materials in resolving the closely related question of congressional power to add qualifications in *Powell v. McCormack*, 395 U.S. 486 (1969). After an exhaustive analysis of the Qualifications Clause, the *Powell* Court concluded that the qualifications established by the Constitution are exclusive. That conclusion controls this case.

a) The Constitutional Text

Constitutional construction must begin with the text of the document itself. *Nixon v. United States*, 113 S. Ct. 732, 737 (1993); *Wright v. United States*, 302 U.S. 583, 588 (1937). Article I, §§ 2 and 3, establish national, uniform qualifications for federal representatives and senators: age,

citizenship, and residency.² Neither provision, on its face, grants either Congress or the States any authority to impose additional qualifications.

The plain and natural meaning of the constitutional text, therefore, is that such authority does not exist. This interpretation, moreover, is most consistent with the Framers' goal of allowing the broadest possible range of citizens to stand for federal election. *Powell*, 395 U.S. at 547 ("A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them.' As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself") (citations omitted); *The Federalist* No. 52, at 360 (J. Madison) (Bourne ed., 1917) ("Under these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any

²Although other sections of the Constitution provide additional restrictions, these are almost all designed to address *all* federal officials, not just members of Congress. See U.S. Const. amend. XIV, § 3 (disqualification for insurrection or rebellion); art. I, § 3, cl. 7 (impeachment); art. I, § 6, cl. 2 (prohibition on holding federal office while serving in Congress); art. VI, cl. 3 (oath to uphold Constitution); art. IV, § 4 (Republican form of government). Even if these were considered as additional constitutionally based "qualifications," they hardly suggest that either Congress or the states can add others. See *Powell*, 395 U.S. at 520 n.21 (declining to address question of whether other constitutional restrictions constitute "qualifications"). The same is true with respect to the Religious Test Clause, U.S. Const., art. VI. By its own terms, that clause applies to "any office or public trust under the United States."

particular profession of religious faith.”³ It is also consistent with the Framers’ design of a *national* legislature, with defined state representatives and uniform terms of office.

This reading of the constitutional text is further supported by the power that *was* given to the states: the power to regulate the electoral *process* in the Times, Places, and Manner Clause. U.S. Const., art. I, § 4. While this provision does authorize state regulation of elections, subject to congressional alteration, it certainly does not authorize states to propose additional *qualifications* for federal office. This conclusion follows directly from *Powell*, which held that Congress had no such power. Since both state power *and* congressional power over Congressional elections are derived from Section 4, and since Congress clearly has no power to add qualifications (*Powell*), it necessarily follows that *neither* Congress *nor* the states may enact additional qualifications.

Finally, Article I, § 5 provides that each House shall be “the Judge of the Elections, Returns, and Qualifications of its own Members.” As this Court held in *Powell*, the power thereby granted to the House and to the Senate is limited to judging those qualifications listed in the Constitution. 395 U.S. at 548. That conclusion strongly suggests the absence of any state power to add additional qualifications.⁴

³See also *Signorelli v. Evans*, 637 F.2d 853, 859 (2d Cir. 1980) (recognizing “the expressed intent of the Framers to maintain broad public choice of elected representatives”); 2 Max Farrand, *The Records of the Federal Convention of 1787*, at 121 (rev. ed. 1937) (“2 Farrand”); 2 *Elliot’s Debates on the Federal Constitution* 257 (1836); Pet. App. at 14a.

⁴Indeed, provisions granting state legislatures the power to judge their own members’ qualifications were commonplace in state constitutions of the period but “[t]here is, so far as appears, no instance in which a State Legislature, having such a provision in its

b) The Historical Record

The clear import of the text also finds support in the debate over the Constitution and in its historical context.⁵

Term limitations were commonplace prior to the adoption of the Constitution and were expressly included in the Articles of Confederation. Arts. Confed. V (1777). Although several states imposed additional rotation in office provisions during this time period, Pennsylvania later repealed its restrictions, noting that it “deprived [the people] of the right of choosing those persons whom they would prefer.” Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 439 (1969) (“*The Creation of the American Republic*”). Massachusetts, too, abandoned term limits in 1780. *Id.* at 436. As Charles Warren explained, such provisions “had worked very badly in [the Continental] Congress and had served to prevent the re-election of delegates just at a time when they were becoming most valuable to their states. This had been notably the case with reference to James Madison himself.” *The Making of the Constitution* 613. As a result, the American public became “increasingly disillusioned with

Constitution, undertook to exclude any member [of Congress] for lack of qualifications other than those required by such Constitution.” Charles Warren, *The Making of the Constitution* 423 (1928) (“*The Making of the Constitution*”).

⁵These materials were comprehensively surveyed by this Court in *Powell*, and many of the perennial objections raised over the years by various commentators, and raised again by petitioners here, were considered and rejected. See, e.g., *Powell*, 395 U.S. at 533-34 & 527 n.75 (minimum floor argument), 539 (negative phrasing argument), 520 n.41 (other constitutional restrictions argument). See also Levy, *Can They Throw the Bums Out? The Constitutionality of State Imposed Congressional Term Limits*, 80 Geo. L.J. 1913, 1933 (1992). No persuasive argument has been advanced to abandon *Powell*.

the political and social effects of rotation." *The Creation of the American Republic* 140-41.

(1) The Constitutional Convention

This experience with term limits was still quite recent when the Philadelphia Convention was convened to address the flaws evident in the Articles of Confederation. At the outset of the Constitutional Convention, Governor Edmund Randolph of Virginia offered the initial proposal on the qualifications of candidates for the national legislature. The "Virginia Plan" included property requirements, residency standards, restrictions on activities after service in the legislature, and, significantly, a rotation system of term limits. See 1 1787 *Drafting the U.S. Constitution* 238 (Wilbourn E. Benton ed., 1986). The rotation provision, however, "seemed of so little value that [it was] stricken out on motion of [Charles] Pinckney on June 12, [1787] without opposition and without recorded discussion, and never heard of again." Thornton Anderson, *Creating the Constitution* 123 (1993). See also 1 Farrand, at 217.

The ensuing debate at the Constitutional Convention demonstrates that the qualifications adopted were intended by the Framers to be fixed, uniform, and exclusive. In the context of discussing the proposed property qualification, Madison argued that a recognition of the power to add qualifications would necessarily include the power to undermine the provisions specified in the text. Characterizing the ability to add qualifications as "an improper and dangerous power," 2 Farrand, at 250, Madison argued:

[t]he qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those [qualifications] of

either [the electors or the elected], it can by degrees subvert the Constitution.

Id. Unless the qualifications were fixed in the Constitution, Madison warned, "[q]ualifications founded on artificial distinctions may be devised by the stronger in order to keep out partisans of a weaker faction." *Id.*⁶

Petitioners argue that Madison was disputing only the power of Congress to add qualifications. But Madison's argument that the qualifications are exclusive applies with equal force to the states. Indeed, Madison's argument would be far less compelling absent a presupposition that the states, too, lack the power to impose qualifications.⁷ All

⁶Indeed, it is not difficult to imagine the variety of additional qualifications states might impose if petitioners are correct that the Qualification Clauses state only minimum qualifications. States could bar all but former state legislators from service in Congress, or from appearing on the ballot. Others might bar all but those with extended residency in the state, or residency within particular parts of the state, or those born in the state, or born in the United States. And if states could impose such restrictions as "times, places, or manner" regulations, then Congress, too, could "make or alter" those restrictions. It might, therefore, bar all but incumbent House members from running for the Senate, or ban all state legislators from running for Congress. This is, of course, precisely what Madison feared and why he thought the power "improper and dangerous." 2 Farrand, at 250.

⁷As Congressman Key argued during the debate over Rep. William McCreery's contested election in 1807, the Framers who raised objections to the proposed property qualification

never supposed the qualifications were not fixed by the Constitution; for, men of such talents and reputations would never have urged that as an objection to the Constitution if, for a moment, they had supposed the Legislatures of the States competent to make such alteration.

of the states at that time imposed some form of property qualification for state legislators, with the sole exception of New York. *The Making of the Constitution* 416-17. Had it been understood that such restrictions could be imposed by the states on their federal representatives, there would have been little need for the extended debate over the proposed qualification. And it would have been odd, to say the least, for Madison to have argued that the qualifications were "fundamental" to a Republican form of government and were "fixed by the Constitution," if he in fact meant to say that the qualifications were *unfixed* and could be altered by the states at will. Such an interpretation stands Madison's comments on their head.

The Convention agreed with Madison and "defeated the proposal to give to Congress power to establish qualifications in general, by a vote of seven states to four, and it also defeated the proposal for a property qualification, by a vote of seven states to three." *The Making of the Constitution* 421.

Several of the parties and *amici* argue that a provision that would have expressly made the Qualifications Clause exclusive was deleted by the Committee of Detail during the Constitutional Convention. See, e.g., Brief for Petitioners U.S. Term Limits, Inc., et al., at 39. These parties and *amici* argue that this Court should infer from this that the Convention meant to allow the states power to impose additional qualifications. The Convention, however, might also have thought the language surplusage and the listed qualifications exclusive. Moreover, the Convention rejected proposals to give Congress power to establish additional qualifications, and defeated a variety of additional qualifications proposed as amendments to the

17 *Annals of Cong.* 911-15 (1807), reprinted in 2 *The Founders' Constitution* 80-81 (Philip B. Kurland & Ralph Lerner eds., 1987).

Constitution itself. Drawing inferences from legislative inaction is treacherous business under the best of circumstances. At most, the history of the Convention demonstrates that the Framers considered a variety of arrangements, adopted some and rejected others, and determined to render the qualifications "defined and fixed in the Constitution." *The Federalist* No. 60, at 414 (A. Hamilton) (Bourne ed., 1917). See also 2 Farrand, at 250 ("qualifications . . . fixed by the Constitution.") (J. Madison).⁸

(2) The Ratification Debates

The evidence from the ratification debates that followed the Convention further confirms that the qualifications were fixed in the Constitution. In explaining why the Constitution exclusively defines the qualifications for federal office but not the qualifications for voters, Madison wrote:

The qualifications of the elected being less carefully and properly defined by the State Constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and

⁸Petitioner U.S. Term Limits argues that "[w]hen the handful of disqualifications in Article I was adopted, no one said they were exclusive, much less put such a proposition to a vote." Brief for Petitioners U.S. Term Limits, et al., at 41. In fact, John Dickinson, a delegate to the Convention from Delaware, had opposed "any recital of qualifications in the Constitution" for "it was impossible to make a compleat one and a partial one would by implication tie up the hands of the Legislature from supplying the omission." 2 Farrand, at 126. This argument, of course, is based upon the Latin maxim *expressio unius exclusio alterius*. Since the Framers were very well aware of this principle and rejected Dickinson's argument, it is in fact quite likely that the Convention understood the effect of a limited list of qualifications and intended that very result.

regulated by the Convention. . . . Under these reasonable limitations, the door of this part of the Federal Government, is open to merit of every description[.]

The Federalist No. 52, at 360 (J. Madison) (Bourne ed., 1917).

Though rotation provisions were summarily rejected as qualifications at the Convention, during the course of the ratifying debate the issue became a major source of disagreement. But even the Anti-Federalists did not contemplate a state power to impose term limitations.

The Anti-Federalists feared that, absent federal constitutional term limits, Congress would become "a class unto themselves." Levy Mahoney, *The Framing and Ratification of the Constitution* 206 (1987). This urgent argument on the "need" for the inclusion of term limits in the Constitution rests on an understanding that the several states lacked the power to impose federal term limitations.

The Federalists were equally emphatic in advocating against the adoption of any term limit provision. At the New York ratifying convention Robert Livingston argued:

The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights. This rotation is an absurd species of ostracism—a mode of proscribing eminent merit, and banishing from stations of trust those who have filled them with the greatest faithfulness. . . . We all know that experience is indispensably necessary to good government. Shall we, then, drive experience into obscurity?

2 *Elliot's Debates on the Federal Constitution* 293 (1836). Alexander Hamilton concurred:

[I]n contending for a rotation, the gentlemen carry their zeal beyond all reasonable bounds. I am convinced that no government, founded on this feeble principle, can operate well: I believe also that we shall be singular in this proposal. . . . When a man knows he must quit his station, let his merit be what it may, he will turn his attention chiefly to his own emolument . . . This reasoning shows that a rotation would be productive of many disadvantages: under particular circumstances, it might be extremely inconvenient, if not fatal to the prosperity of our country.

Id. at 320-21 (emphasis in original). Hamilton, in fact, devoted *The Federalist* No. 72 to articulating his objections to rotation in office provisions.

The events during the period immediately following the ratification of the Constitution further confirm the Framers' understanding that states were precluded from imposing term limitations under the Constitution. Most notably, in spite of the fervent advocacy of the Anti-Federalists in support of term limits throughout the ratification period, no state adopted term limit restrictions on its members of Congress.⁹

⁹Petitioner U.S. Term Limits argues that since 1788 states have enacted additional qualifications. Brief for Petitioners U.S. Term Limits, Inc., et al., at 25-27. Many of these state provisions, however, are wholly unremarkable exercises of state power to regulate state office holders, or to regulate the electoral process, or to bar "sore loser" candidacies, such as those upheld by this Court in *Storer v. Brown*, 415 U.S. 724 (1974). Curiously, and perhaps more tellingly, notwithstanding the strenuous efforts made during the Constitutional Convention and thereafter by the Anti-Federalists to adopt rotation-in-office provisions, U.S. Term Limits fails to identify any term limit provisions passed by the states in the years following the adoption of the Constitution. See also Brief for the

The early Congressional actions interpreting the Qualifications Clauses are equally telling. In *Powell*, the Supreme Court discussed the case of Representative William McCreery, whose seating was challenged in 1807 for failure to meet Maryland's district-residency qualification. *Powell*, 355 U.S. at 542. The House Committee of Elections concluded that "neither the State nor the Federal Legislatures are vested with authority to add to those qualifications, so as to change them." *Id.* at 543 (quoting 17 *Annals of Cong.* 871 (1807)).

c) Scholarly Commentators

Prominent scholars of American constitutional history have reached the same conclusion. Justice Story discussed at length the meaning of the Qualifications Clauses and the conspicuous absence of any residual state authority to speak on this matter. 2 Joseph Story, *Commentaries on the Constitution of the United States* §§ 624-629 (1891). Story observed that at the time of the Convention, the thirteen states imposed a wide variety of qualifications on their state legislators. Although it would have been more expedient and convenient for the Framers simply to allow existing state law to define the qualifications for the elected, as they did with the qualifications for voters, this issue was a "subject thought proper for regulation by the convention." *Id.* § 624. Story concluded that "when the Constitution

State Petitioner, at 25 (arguing that historic figures have supported rotation-in-office provisions, but failing to identify any state term limits adopted in the early years). Although U.S. Term Limit notes that "Pennsylvania's congressional term-limits requirement continued in effect," Brief for U.S. Term Limits, Inc., et al, at 26 (citing Pa. Const., § 11 (1776)), it fails to note that Pennsylvania in fact repealed those provisions at its state constitutional convention called on March 24, 1789, and convened on November 24, 1789, eight months after the Constitution was ratified. See 5 F. Thorpe, *The Federal and State Constitutions*, at 3092 n.a (1906).

established certain qualifications, as necessary for office, it meant to *exclude all others* as prerequisites." *Id.* (emphasis added).¹⁰ See also *The Making of the Constitution* 422 (Framers "clearly left the provisions of the Constitution itself as the sole source of qualifications.").

d) *Powell v. McCormack*

This reading of the constitutional text, purpose, and history is precisely that reached by this Court in its landmark decision in *Powell v. McCormack*, 395 U.S. 486 (1969).

In *Powell*, this Court considered whether Congress generally or one House specifically could add to the constitutional qualifications for the House of Representatives. There, this Court considered House Resolution 278, passed in 1967, which purported to exclude Adam Clayton Powell, who had been reelected by the voters of his district, from taking his seat in the House despite his constitutional qualifications of age, citizenship, and residency. *Id.* at 492. The Court initially confronted the question whether the House had the power to set additional qualifications beyond those stated in the Constitution. *Id.* at 521-22.

¹⁰Justice Story's analysis is echoed by numerous influential Constitutional scholars, including Thomas Cooley, James Kent, and Charles Burdick. Judge Cooley was quoted by the court in *Hellmann v. Collier*, 217 Md. 93, 141 A.2d 908, 912 (1958), for a footnote he wrote to Justice Story's works in which he declared that "[i]t is now universally conceded that a State cannot prescribe qualifications for members of Congress, or establish disabilities. The whole subject is beyond the sphere of its powers." See also Charles Burdick, *The Law of the American Constitution* 160, 165 (1929) (same); Thomas Cooley, *General Principles of Constitutional Law* 268 (1891 ed.) (same); 1 James Kent, *Commentaries on American Law* 228 n.b (3d ed. 1836) (same).

The Speaker of the House, the respondent in *Powell*, argued that Congress had the power under the Constitution to be the judge of the qualifications of its own Members. *Id.* The Court, however, held that the House's power under this clause was limited to judging a Member's compliance with those qualifications *prescribed in the Constitution*. *Id.* at 521. Congress, the Court ruled, lacked the power under the Constitution to add qualifications for membership. *Id.* at 548.

The Court's holding—invalidating the attempt to exclude Powell—was grounded upon its conclusion that the qualifications established in the Constitution are exclusive. That conclusion necessarily controls the “more narrow,” *id.* at 543, question of state power to add qualifications.¹¹ Significantly, the Court relied on historical evidence addressing *state* power to add qualifications. *Id.* at 542 (discussing Rep. William McCreery's 1807 contested election for failing to meet state-imposed qualifications). Thus, the Court's conclusion in *Powell* was necessarily founded on its determination that the qualifications established by the Constitution are exclusive.

e) Every Court to Have Considered the Issue Has Concluded That the Qualifications Clause Is Exclusive

State power to add qualifications to those established by the Constitution has been uniformly rejected by the

¹¹ Although petitioners may be correct that *Powell* itself did not directly address *state* power to add qualifications, its holding and its supporting analysis necessarily foreclose any argument that states have greater power in this area. Indeed, the constitutional text itself suggests that Congress would have *greater*, not *lesser*, power in this area because it provides Congress, but not the states, with power to judge qualifications, U.S. Const., art. I, § 5, and Congressionally imposed qualifications would at least be uniform nationwide.

myriad of courts, both state and federal, to have addressed the question. Indeed, the issue has been litigated in many different qualification contexts and in each case, without exception, and usually without controversy, the exclusivity of the constitutional qualifications has been affirmed.

The earliest case to address this issue was *State ex rel. Chandler v. Howell*, 104 Wash. 99, 175 P. 569 (1918). The issue in *Howell* was whether a state judge could run for Congress in light of a provision in the Washington state constitution making state judges ineligible for any other office during the term for which they had been elected. 175 P. at 570. Considering both Congressional precedent and the unanimous analysis of several Constitutional scholars, the Court concluded that

[s]o long as a candidate for membership in Congress meets the requirements set forth in the Constitution which created the office, no state has the right or authority to prevent his candidacy either by provision in its Constitution or in its statutes.

Id.

The *Howell* court's analysis is echoed in other early cases confronting the same question. For example, in *Ekwall v. Stadelman*, 146 Or. 439, 30 P.2d 1037, 1040 (1934), the court held a requirement that judges take an oath not to accept any other office during the term for which they are elected invalid as applied to federal offices. As in *Howell*, the *Ekwall* court concluded that “it is evident that the object of the Constitution in enumerating the qualifications for Representatives was that they might be uniform throughout the Union.” 30 P.2d at 1039. *See also Stockton v. McFarland*, 56 Ariz. 138, 106 P.2d 328, 330 (Ariz. 1940) (“both Houses have invariably followed the rule that no qualification additional to those imposed by the Federal Constitution itself could be imposed by any state.”).

Similarly, in *State ex rel. Johnson v. Crane*, 65 Wyo. 189, 197 P.2d 864 (1948), the court held that a state constitutional provision making the governor ineligible to run for any other office during his elected term could not prevent the governor from running for the United States Senate. In the course of its opinion, the court considered congressional precedent, including the challenge to Illinois Senator Lyman Trumball on the grounds that a provision of the Illinois Constitution made him ineligible for office.

The court approvingly quoted Senator Crittenden's response to the Trumball challenge:

'[t]he whole object of the Constitution of the United States could not be more completely subverted by eradicating from the Constitution the positive qualifications which it requires, than, it would be in substance, and virtually, by superadding qualifications. If the Constitution has not thought proper to make further qualifications, what is the reason of it? It is because its framers did not desire any other to be made. Did they intend carefully to make these qualifications, and then leave it to the States to make any which, according to their casual will, or wish, or caprice, they might, from time to time, make?'

197 P.2d at 869 (quoting *The Legal Qualifications of Representatives*, 3 Am. L. Rev. 427 (1868-69)).

Subsequent cases have all reached the same conclusion and many have noted the remarkable unanimity on this issue. See *Dillon v. Fiorina*, 340 F. Supp. 729, 731 (D.N.M. 1972) ("That a state cannot add to or take away from these qualifications is well settled"); *Stack v. Adams*, 315 F. Supp. 1295, 1297 (N.D. Fla. 1970) ("That the qualifications prescribed in the United States Constitution are exclusive and that state constitutions and laws can neither add to nor take away from them is universally

accepted and recognized"); *Buckingham v. State*, 42 Del. 405, 35 A.2d 903, 905 (1944) ("The authorities are uniform . . ."); *Stumpf v. Lau*, 108 Nev. 826, 839 P.2d 120, 123 (1992) (noting that because the proposition is so obvious and there is no authority to the contrary, "this point need not be overly belabored"); *Danielson v. Fitzsimmons*, 232 Minn. 149, 44 N.W.2d 484, 486 (1950) (finding that to the best of the court's knowledge "[a]ll authorities . . . are in accord. None to the contrary[.]"); *In re Opinion of Judges*, 79 S.D. 585, 116 N.W.2d 233, 234 (1962) ("[b]ecause of the *unanimity* in these cases we see no need to review them here") (emphasis added).

Indeed, various lower courts have consistently struck down many and varied types of state-imposed qualifications for federal office, including term limits,¹² district residency requirements,¹³ loyalty oath requirements,¹⁴ and

¹²See, e.g., *Thorsted v. Gregoire*, 841 F. Supp. 1068, 1081 (W.D. Wash. 1994); *Stumpf*, 839 P.2d at 123 ("The term limits initiative clearly and 'palpably' violates the qualifications clauses of Article I of the United States Constitution."); Pet. App. at 14a. See also *Plugge v. McCuen*, 310 Ark. 654, 841 S.W.2d 139, 150 (1992) (Dudley, J., dissenting).

¹³See, e.g., *Dillon*, 340 F. Supp. at 731 (two-year residency requirement rejected because "that a state cannot add to or take away from these qualifications is well settled"); *Exon v. Tiemann*, 279 F. Supp. 609, 613 (D. Neb. 1968) (states cannot require House candidates to reside in the district in which they were nominated); *Hellmann v. Collier*, 141 A.2d at 911 (striking similar law because "no state has the power to fix the qualifications of Representatives in Congress"); *State ex rel. Chavez v. Evans*, 79 N.M. 578, 446 P.2d 445, 448 (1968) (per curiam) (invalidating similar law because "the constitutional qualifications . . . exclude all other qualifications, and state law can neither add to nor subtract from them").

¹⁴See, e.g., *Shub v. Simpson*, 196 Md. 177, 76 A.2d 332, 341, appeal dismissed, 340 U.S. 881 (1950) (anti-subversion declaration

prohibitions on campaigns for federal office by those convicted of felonies,¹⁵ those who are state judges,¹⁶ and

requirement held unconstitutional because "a state cannot in any manner impose additional qualifications upon a candidate for representative in Congress"); *In re O'Connor*, 173 Misc. 419, 17 N.Y.S.2d 758, 760 (N.Y. Super. Ct. 1940) (rejecting qualification that House candidate abandon his advocacy of international communism or abdicate his position in the communist party).

¹⁵See, e.g., *Application of Ferguson*, 57 Misc. 2d 1041, 294 N.Y.S.2d 174, 176 (N.Y. Super Ct. 1968) (state law making convicted felons ineligible to seek public office inapplicable to U.S. Senate candidate); *Danielson v. Fitzsimmons*, 232 Minn. 149, 44 N.W.2d 484, 486 (1950) (holding that state constitutional provisions prohibiting felons from being candidates for any elective office were inapplicable to federal offices because "[t]he qualifications of those who aspire to or hold [federal office] are prescribed by the United States constitution, and the state may not enlarge or modify such qualifications"); *State ex rel. Eaton v. Schmahl*, 140 Minn. 219, 167 N.W. 481, 481 (1918) (per curiam) (state constitutional provision prohibiting felons from candidacy held inapplicable to candidates for federal office because the "qualifications of those aspiring to or holding the [federal] position are . . . prescribed by the Federal Constitution, which the state is without authority to modify or enlarge in any way").

¹⁶See, e.g., *Stockton*, 106 P.2d at 331 (finding provision of Arizona constitution providing that state judges shall not be eligible for any other public office during elected term does not prohibit a judge from running for Congress); *Buckingham*, 35 A.2d at 905 (exclusion of judges during term of office and six months thereafter held unconstitutional because "a State may not change those [Constitutional] qualifications or add others thereto"); *State ex rel. Santini v. Swackhamer*, 90 Nev. 153, 521 P.2d 568, 570 (1974) (per curiam) (declaring invalid state constitutional provision that prohibited state judges from running for the House of Representatives during their term of office); *Riley v. Cordell*, 200 Okla. 390, 194 P.2d 857, 862 (1948) (state statute making justices of Oklahoma Supreme Court ineligible for any other public office during term of office could not prevent justice from becoming

other state officers.¹⁷

candidate for U.S. Senate); *State ex rel. Wettengel v. Zimmerman*, 249 Wis. 237, 24 N.W.2d 504, 508-09 (1946) (finding similar state constitutional provision inapplicable to federal office seekers)

¹⁷See, e.g., *Stack v. Adams*, 315 F. Supp. 1295, 1297 (N.D. Fla. 1970) (state could not require state officeholders to resign before running for Congress); *State ex rel. Pickrell v. Senner*, 92 Ariz. 243, 375 P.2d 728, 730 (1962) (same because "[a] state legislature is without power to add 'qualification' requirements to a federal office"); *Lowe v. Fowler*, 240 Ga. 213, 240 S.E.2d 70, 71 (1977) (same because the Constitution "provides the sole and exclusive qualifications" for federal House of Representatives); *Richardson v. Hare*, 381 Mich. 304, 160 N.W.2d 883, 887-88 (1968) (same because the Constitution "exclusively sets forth the qualifications of the members of congress"). Although several recent cases have suggested that such "resign-to-run" statutes do not constitute impermissible state-imposed "qualifications," even those cases have uniformly acknowledged that "the three qualifications contained in the [Qualifications] Clause—age, citizenship, and residency—are exclusive, and that neither Congress nor the states may require more of a candidate." *Joyner v. Mofford*, 706 F.2d 1523, 1528 (9th Cir.), cert. denied, 464 U.S. 1002 (1983). See also *Signorelli*, 637 F.2d at 858 ("[t]he principle that a branch of Congress cannot add to, subtract from, or modify those qualifications, *ibid.*, applies with equal force to the states."); *Adams v. Supreme Court*, 502 F. Supp. 1282, 1291 (M.D. Pa. 1980) (same); *Oklahoma State Election Bd. v. Coats*, 610 P.2d 776, 778 (Okla. 1980) (same); *Alex v. County of Los Angeles*, 35 Cal. App. 3d 994, 111 Cal. Rptr. 285, 293 (Cal. Dist. Ct. App. 1973) (same). *Clements v. Fashing*, 457 U.S. 957 (1982), involved a slightly different statute, treating a candidacy for any office "of profit or trust under the laws of this State or the United States," if commenced more than a year prior to the expiration of a state officer's term, as an "automatic resignation." *Id.* at 960. The statute did not bar any candidacy, restrict access to the ballot, or otherwise regulate the electoral process. The clear purpose of the statute at issue in *Clements*, as in *Joyner* and *Signorelli*, was instead to regulate the conduct of state officers. The statute was

Petitioners here contend that all of these courts, for all of these years, were simply wrong on this critical issue and that, in fact, states *do* have such power. This argument should be dispatched with the same summary dismissal the argument has merited in all of the many prior cases to have considered it.

2. The Term Limits Amendment Is an Additional Qualification for Federal Office, Not a Regulation of the Electoral Process

In the case at hand, the restrictions imposed by the term limits amendment constitute additional state-imposed "qualifications" for federal office. The depth of legislative experience held by a candidate is a classic personal characteristic—like age, citizenship, and residency—wholly unrelated to any legitimate state interest in the electoral process or in the conduct of state officeholders. No court has ever recognized as legitimate a state interest in barring or burdening a particular class of otherwise constitutionally qualified candidates for Congress to make it more difficult or impossible to win. The term limits amendment's stated purpose, and almost certain effect, is to do just that. As a result, it constitutes a "qualification," and must be rejected.

a) Restrictions Based on Personal Characteristics of Candidates Constitute Additional "Qualifications"

Appellants contend that, because the term limits law allows the remote possibility of a write-in candidacy, it constitutes nothing more than a mere "ballot access" measure—an exercise of state power under the "Times, Places, and Manner" Clause of the Constitution: U.S.

upheld against First and Fourteenth Amendment challenges without discussion of the Qualification Clauses.

Const., art. I, § 2. This argument should be rejected. While a state certainly has the power to regulate the electoral process to impose "some sort of order, rather than chaos" on the electoral process, *Burdick v. Takushi*, 112 S. Ct. 2059, 2063 (1992), and additionally has "plenary power to regulate the conduct of its own elected officials," *Joyner*, 706 F.2d at 1528, neither provides a ground for imposing qualifications under the guise of such regulatory interests.

On such reasoning, states could impose virtually any qualification—property ownership, lack of felony convictions, narrow district residency requirements, or loyalty oath requirements—all by simply phrasing the qualification as a "ballot access" measure. The argument that any qualification can be effectively imposed so long as the most remote possibility of a write-in candidacy is left available should be rejected outright. Constitutional protections—particularly structural provisions allocating power between the federal and state governments—cannot be so easily evaded by slight of hand. *Frost & Frost Trucking Co. v. Railroad Comm'n of Calif.*, 271 U.S. 583, 593-94 (1926).

The argument advanced by respondent representatives Jay Dickey and Tim Hutchinson is similarly flawed. The respondent representatives argue that Article I, § 5 of the Constitution makes each House of Congress "the Judge of the Elections, Returns and Qualifications of its own Members." The representatives argue that, because this term limit is framed as a "ballot access" measure, there is nothing for the House or Senate to judge and, accordingly, Amendment 73 cannot constitute a qualification. This wooden argument proves far too much and must be rejected. Again, states could impose virtually any qualification—higher age requirements, different residence requirements, or the like—so long as they were framed in terms of a mere ballot access provision, even if baldly designed to "limit the terms of elected officials." Arkansas

Const., amend. 73 (Preamble). Were such a course available to the states, then the exclusiveness of the Qualifications Clause would be rendered utterly meaningless, for the states could impose any qualification they wished, so long as they complied with the "ballot access" form. The argument places form above substance and should be rejected.

Ballot access limitations for federal elections keyed to a candidate's personal characteristics advance neither legitimate state interests authorized by Article I, § 4 in regulating the electoral process, nor in regulating the conduct of state officeholders. Rather, such restrictions are no more or less than attempts by the state to control the result of the congressional election. The state's purported interest in "leveling the playing field" is premised on the inference that the voters' "true" preferences are not reflected in their votes and that the state may therefore intervene to impede candidates for federal office it thinks too popular in order to promote others. Such an effort can only be described as an attempt to *disqualify* a class of federal candidates. It is wholly foreign to our federal system of government and the constitutionally designed framework for congressional elections.

b) The Stated Purpose and Almost Certain Effect of the Term Limits Law Is to Limit Terms by Effectively Disqualifying Incumbents From Reelection

Moreover, the stated purpose of the term limit law is not to regulate evenhandedly the "manner" of the congressional election, but to determine the outcome. It is therefore designed to, and clearly does, operate as an additional "qualification" for federal office.

By its express terms, Amendment 73 is plainly intended to "limit the terms of elected officials." Arkansas

Const., amend. 73 (Preamble). Indeed, the Preamble recites in detail the supposed evils of incumbency. Its purpose could not be more clearly stated to remove this class of constitutionally qualified candidates by limiting their terms. The state petitioner acknowledges that "a purpose and hoped-for effect of Amendment 73 is to increase rotation in office." Brief for the State Petitioner, at 39. And respondent Representatives Dickey and Hutchinson concede that Amendment 73 "will undoubtedly make it more difficult for those individuals to win reelection, and may well result in electoral defeat for many incumbents." Brief for Respondent Representatives Jay Dickey and Tim Hutchinson, at 10.

Thus, the stated purpose, design, and almost certain effect of the term limits law is to limit terms. "In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impacts on voters." *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). The narrow possibility of a write-in candidacy does not magically transform a plainly unconstitutional qualification into a permissible ballot access measure.¹⁸

¹⁸Indeed, every court to have considered the issue has rejected the attempt to disguise a qualification as a "ballot access" regulation. See, e.g., *Thorsted*, 841 F. Supp. at 1082; *Stumpf*, 839 P.2d 120; Pet. App. at 14a. Flat term limit prohibitions have also been recognized as "qualifications." See *Miyazawa v. City of Cincinnati*, 825 F. Supp. 816, 822 (S.D. Ohio 1993) (term limits recognized as an "additional condition for candidate eligibility"); *Legislature v. Eu*, 54 Cal. 3d 492, 286 Cal. Rptr. 283, 816 P.2d 1309, 1325 (1991) (term limits on state officials constitute additional "qualifications"), *cert. denied*, 112 S. Ct. 1292 (1992). The Court should note that the respondents in *Eu*, with the assistance of some of the same *amici* supporting petitioners here, "characteriz[ed] the term limitation . . . as additional candidacy qualifications akin to age or residency." 816 P.2d at 1325 (emphasis added).

B. NEITHER THE NINTH NOR TENTH AMENDMENTS RESERVE POWER TO THE STATES TO ADD QUALIFICATIONS FOR FEDERAL OFFICE

Contrary to petitioners' assertion, the Ninth or Tenth Amendments cannot be read to reserve any power to the states to add qualifications for the Congressional offices first established by the Constitution itself. Those amendments reserved only power held by the states *prior* to the adoption of the Constitution; they do not purport to confer new or additional power to the states. *New York v. United States*, 112 S. Ct. 2408, 2418 (1992). Since the qualifications for representatives in the newly created national government were comprehensively regulated in the Constitution and, by definition, did not pre-date that document, no residual state power is reserved by the Ninth and Tenth Amendments.¹⁹

C. AMENDMENT 73 CANNOT BE JUSTIFIED AS A "TIMES, PLACES, AND MANNER" REGULATION

Even if this Court were to determine that the term limits amendment does not constitute an additional qualification, it must nonetheless be rejected. Although the states retain the power to impose reasonable regulation of the time, place, and manner of elections, and broad

¹⁹Precisely this point was made by Justice Story in his Commentaries in addressing this same Ninth and Tenth Amendment argument: "No state can say[] that it has reserved[] what it never possessed." 2 Joseph Story, *Commentaries on the Constitution of the United States* §§ 625-626 (1st ed. 1833). Even prominent term limit supporters concede this point. See Hills, *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. 97, 103 (1991) ("The power to set qualifications for federal officials is probably not an original power retained by the states under the Tenth Amendment").

authority to regulate the conduct of their own state officers, that regulatory authority is plainly not unbounded and they most assuredly do not have any power under Article I, § 4 to control the outcome of a congressional election.

1. The Scope of the State's Power to Regulate Federal Elections Is Not Unlimited

a) State Power to Regulate the "Times, Places, and Manner" of Federal Elections

A state's power to regulate how federal elections are conducted is derived from Article I, § 4 of the Constitution. This Court has upheld state efforts to impose "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Anderson*, 460 U.S. at 788 n.9. States may regulate elections to ensure they are "fair and honest" and that "some sort of order, rather than chaos," accompanies the democratic processes. *Storer*, 415 U.S. at 730. States, accordingly, have a legitimate interest in preventing voter confusion or the presence of frivolous candidates, *Anderson*, 460 U.S. at 788 n.9, in minimizing "unrestrained factionalism," *Storer*, 415 U.S. at 736, or in limiting "the number of run-off elections." *Lubin v. Panish*, 415 U.S. 709, 712 (1974).

Under Article I, § 4, the state's interest is in regulating the *process* of congressional elections, not the outcome. And, although particular candidates may be excluded or burdened in the process, that is a side-effect of the regulation, not its purpose. In all cases the state's power is aimed at ensuring that candidates with a significant degree of public support appear on the ballot. Term limit provisions seek the opposite—to exclude certain candidates precisely because they have "too much" public support as evidenced by prior electoral victories. *Cf. Buckley*, 424 U.S. at 48-49.

b) State Power to Regulate State Office Holders

In addition to their power under the Times, Places and Manner Clause, states retain "plenary power to regulate the conduct of [their] own elected officials." *Joyner*, 706 F.2d at 1528. On this ground, the so called "resign-to-run" statutes, which typically prohibit state officials from running for another elective office while serving their state term, have been upheld as a valid exercise of the state power to regulate the conduct of state office holders. See *supra*, at 20-21 n.16.²⁰

2. The Term Limits Law Is Not a Valid "Times, Places, and Manner" Regulation

The term limit law cannot be defended as a valid time, place, and manner regulation. Closing the ballot to a class of qualified federal candidates who enjoy strong popular support in order to hinder their election has never been recognized as a power authorized by Article I, § 4.

This new interest is characterized by the petitioners as making elections "more representative," Brief for The State Petitioner, at 26, because it allegedly "levels the playing field" between incumbents and nonincumbents. *Id.*; Brief of the Allied Educational Foundation as *Amicus Curiae* in Support of Petitioners, at 10. That is an odd characterization since the purpose of the term limit law is to exclude certain incumbents from the "playing field" entirely.

In any event, the power to intervene in federal elections is not one the Framers chose to allocate to the states in Article I, § 4. And, in the context of federal elections, the

²⁰Whether states have broader power to impose term limits on state officers is not at issue in this case and these *amici* express no view on that issue.

state's asserted interest in protecting voters from their own "uninformed" choices is not one that this Court has accepted as legitimate, even if the term limit law could somehow be described as a time, place or manner regulation. As the Court observed in rejecting Ohio's effort to bar John Anderson from participating in that state's presidential primary because of his failure to comply with an early filing deadline: "A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Anderson*, 460 U.S. at 798.

In short, Amendment 73 represents an effort to influence the outcome of federal elections that goes beyond the states' power to regulate the federal electoral process under Article I, § 4. Under the constitutional system created by the Framers, it cannot be sustained.

CONCLUSION

For the reasons stated, *amici* ACLU and ACLU-W respectfully suggest that this Court affirm the decision below.

RESPECTFULLY SUBMITTED this 17th day of October, 1994.

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